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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior ----- Manual Lujan, Jr.  
Office of Hearings and Appeals ----- James L. Byrnes  
Office of the Solicitor ----- Thomas L. Sansonetti

INDEX-DIGEST

JANUARY - DECEMBER 1990

This index-digest covers all published and unpublished decisions and opinions, by their headnotes and legal cites, of the Department of the Interior from January 1, 1990 - December 31, 1990, rendered in the Office of Hearings and Appeals (OHA), Arlington, VA, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

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Editor: Rachael Cubbage

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SYMBOLS

ANCAB	----	Alaska Native Claims Appeal Board
BIA	----	Bureau of Indian Affairs
BLM	----	Bureau of Land Management
IBCA	----	Interior Board of Contract Appeals
IBIA	----	Interior Board of Indian Appeals
IBLA	----	Interior Board of Land Appeals
IBMA	----	Interior Board of Mine Operations Appeals
IBSMA	----	Interior Board of Surface Mining and Reclamation Appeals
M	----	Solicitor's Opinion
OHA	----	Office of Hearings and Appeals
OSM(RE)	----	Office of Surface Mining Reclamation and Enforcement
SEC	----	Office of the Secretary

\* \* \* \* \*

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 1 IBCA 1 - 7 IBCA 178  
 1 IBIA 1 - 2 IBIA 326  
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	115 IBLA 230 (July 12, 1990)
	115 IBLA 373 (Aug. 16, 1990)
226(b) (1) (A) -----	117 IBLA 1 (Nov. 16, 1990)
226(c) -----	113 IBLA 47 (Jan. 30, 1990)
	113 IBLA 99 (Feb. 14, 1990)
	115 IBLA 164 (June 28, 1990)
	117 IBLA 1 (Nov. 16, 1990)
	117 IBLA 54 (Nov. 27, 1990)
226(e) -----	114 IBLA 1 (Mar. 29, 1990)
226(f) -----	114 IBLA 1 (Mar. 29, 1990)
	114 IBLA 225 (Apr. 26, 1990)
	117 IBLA 130 (Dec. 3, 1990)
226(i) -----	18 IBIA 315, 97 I.D. 215 (1990)
	114 IBLA 1 (Mar. 29, 1990)
226(j) -----	113 IBLA 190 (Feb. 21, 1990)
262 -----	113 IBLA 106 (Feb. 14, 1990)
281 -----	114 IBLA 66 (Apr. 6, 1990)
283 -----	114 IBLA 66 (Apr. 6, 1990)
351-359 -----	115 IBLA 369 (Aug. 15, 1990)
	115 IBLA 373 (Aug. 16, 1990)
	115 IBLA 386 (Aug. 16, 1990)
	116 IBLA 341 (Oct. 29, 1990)
	117 IBLA 96 (Dec. 3, 1990)
	M-36969, 97 I.D. 54 (1989)
351 <u>et seq.</u> -----	M-36969, 97 I.D. 54 (1989)
352 -----	113 IBLA 271 (Mar. 9, 1990)
	115 IBLA 369 (Aug. 15, 1990)
	115 IBLA 373 (Aug. 16, 1990)
	117 IBLA 54 (Nov. 27, 1990)
	M-36969, 97 I.D. 54 (1989)
354 -----	116 IBLA 341 (Oct. 29, 1990)
355 -----	M-36969, 97 I.D. 54 (1989)
359 -----	113 IBLA 243 (Mar. 7, 1990)
611 -----	115 IBLA 277 (July 26, 1990)
	115 IBLA 398 (Aug. 22, 1990)
612 -----	113 IBLA 235 (Feb. 28, 1990)
612(a) -----	113 IBLA 396 (Mar. 28, 1990)
613 -----	113 IBLA 235 (Feb. 28, 1990)



## TITLE 30: Continued

sec. 621 -----	112 IBLA 273 (Jan. 4, 1990)
	113 IBLA 280 (Mar. 12, 1990)
621(a) -----	112 IBLA 273 (Jan. 4, 1990)
	116 IBLA 105 (Sept. 17, 1990)
621(b) -----	113 IBLA 280 (Mar. 12, 1990)
	116 IBLA 105 (Sept. 17, 1990)
623 -----	113 IBLA 280 (Mar. 12, 1990)
1201 -----	114 IBLA 353 (May 23, 1990)
1201 <u>et seq.</u> -----	114 IBLA 353 (May 23, 1990)
1201-1328 -----	113 IBLA 352 (Mar. 22, 1990)
	114 IBLA 291 (May 10, 1990)
	117 IBLA 221 (Dec. 21, 1990)
1211 -----	112 IBLA 266 (Jan. 4, 1990)
1252 -----	115 IBLA 49 (June 12, 1990)
1252(a) -----	115 IBLA 49 (June 12, 1990)
1252(b) -----	114 IBLA 353 (May 23, 1990)
1252(c) -----	114 IBLA 291 (May 10, 1990)
1252(e) -----	114 IBLA 291 (May 10, 1990)
1257(b) -----	112 IBLA 266 (Jan. 4, 1990)
1257(b) (4) -----	112 IBLA 266 (Jan. 4, 1990)
1260(c) -----	112 IBLA 266 (Jan. 4, 1990)
1261(a) (2) -----	113 IBLA 384 (Mar. 28, 1990)
1263 -----	112 IBLA 266 (Jan. 4, 1990)
1264(c) -----	112 IBLA 266 (Jan. 4, 1990)
1265(b) (10) (B) (1) ---	114 IBLA 232 (Apr. 27, 1990)
1265(b) (24) -----	114 IBLA 232 (Apr. 27, 1990)
1268(c) -----	114 IBLA 291 (May 10, 1990)
1271(a) (1) -----	115 IBLA 8 (June 4, 1990)
	116 IBLA 262 (Oct. 18, 1990)
1271(a) (2) -----	114 IBLA 353 (May 23, 1990)
	115 IBLA 8 (June 4, 1990)
1271(a) (3) -----	114 IBLA 291 (May 10, 1990)
1272(e) (3) -----	117 IBLA 221 (Dec. 21, 1990)
1273 -----	112 IBLA 266 (Jan. 4, 1990)
1276(a) -----	114 IBLA 232 (Apr. 27, 1990)
	114 IBLA 291 (May 10, 1990)
1276(a) (1) -----	112 IBLA 266 (Jan. 4, 1990)
1278(2) -----	114 IBLA 353 (May 23, 1990)
1291(4) -----	112 IBLA 266 (Jan. 4, 1990)
	115 IBLA 148 (June 28, 1990)
1291(8) -----	115 IBLA 8 (June 4, 1990)
1291(9) -----	115 IBLA 148 (June 28, 1990)
1300(h) -----	115 IBLA 148 (June 28, 1990)
1602(e) -----	113 IBLA 334 (Mar. 20, 1990)
1701 -----	18 IBIA 315, 97 I.D. 215 (1990)
1701-1757 -----	113 IBLA 30, 97 I.D. 11 (1990)
	115 IBLA 62 (June 14, 1990)
	116 IBLA 384 (Nov. 8, 1990)



## TITLE 30: Continued

sec. 1701(b) -----	113 IBLA 30, 97 I.D. 11 (1990)
	113 IBLA 243 (Mar. 7, 1990)
1702(7) -----	113 IBLA 30, 97 I.D. 11 (1990)
1702(14) -----	115 IBLA 386 (Aug. 16, 1990)
1712(a) -----	113 IBLA 30, 97 I.D. 11 (1990)
1719 -----	113 IBLA 243 (Mar. 7, 1990)
	115 IBLA 62 (June 14, 1990)
	115 IBLA 76 (June 18, 1990)
	116 IBLA 152 (Sept. 24, 1990)
1721 -----	115 IBLA 205 (July 3, 1990)
1721(a) -----	113 IBLA 226, 97 I.D. 74 (1990)
	115 IBLA 62 (June 14, 1990)
	115 IBLA 81 (June 19, 1990)
	117 IBLA 153 (Dec. 13, 1990)
	117 IBLA 199 (Dec. 21, 1990)
1721(b) -----	113 IBLA 243 (Mar. 7, 1990)
	115 IBLA 62 (June 14, 1990)
1735 -----	112 IBLA 373, 97 I.D. 1 (1990)
	115 IBLA 386 (Aug. 16, 1990)
1753(a) -----	113 IBLA 243 (Mar. 7, 1990)

## TITLE 31:

sec. 1301(d) -----	M-36969, 97 I.D. 54 (1989)
1304 -----	IBCA-2262 (Nov. 26, 1990)

## TITLE 33:

sec. 1251-1376 -----	116 IBLA 355 (Nov. 5, 1990)
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## TITLE 35:

sec. 183 -----	114 IBLA 28 (Apr. 3, 1990)
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TITLE 40:

sec. 257 ----- 18 IBIA 131 (Feb. 1, 1990)

TITLE 41:

sec. 300h ----- 18 IBIA 431 (Sept. 17, 1990)  
601-613 ----- IBCA-2554, 97 I.D. 231 (1990)  
IBCA-2262 (Nov. 26, 1990)  
18 IBIA 221 (Mar. 27, 1990)  
18 IBIA 297 (May 22, 1990)  
605 ----- 18 IBIA 221 (Mar. 27, 1990)  
18 IBIA 297 (May 22, 1990)  
607 ----- 18 IBIA 221 (Mar. 27, 1990)  
612(b) ----- IBCA-2262 (Nov. 26, 1990)

TITLE 42:

sec. 1996 ----- 117 IBLA 167, 97 I.D. 263 (1990)  
4321-4335 ----- 116 IBLA 269 (Oct. 22, 1990)  
4321-4370 ----- 114 IBLA 51 (Apr. 6, 1990)  
4321-4370a ----- 115 IBLA 1 (May 30, 1990)  
4331 ----- 115 IBLA 218 (July 12, 1990)  
4332 ----- 114 IBLA 366 (May 14, 1990)  
115 IBLA 88 (June 21, 1990)  
4332-4361 ----- 116 IBLA 129 (Sept. 21, 1990)  
4332(2)(C) ----- 112 IBLA 293 (Jan. 9, 1990)  
115 IBLA 347 (Aug. 13, 1990)  
116 IBLA 269 (Oct. 22, 1990)  
116 IBLA 355 (Nov. 5, 1990)  
117 IBLA 167, 97 I.D. 263 (1990)  
4332(2)(E) ----- 115 IBLA 179 (July 3, 1990)  
4622(a)(1) ----- 8 OHA 134 (Jan. 12, 1990)  
8 OHA 222 (Sept. 14, 1990)  
8 OHA 237 (Nov. 26, 1990)  
4623(a)(1) ----- 8 OHA 134 (Jan. 12, 1990)  
4624 ----- 8 OHA 216 (Aug. 27, 1990)  
7172 ----- 115 IBLA 301 (Aug. 6, 1990)  
7401-7642 ----- 116 IBLA 355 (Nov. 5, 1990)



## TITLE 43:

sec. 141 -----	112 IBLA 273 (Jan. 4, 1990)
	113 IBLA 86 (Feb. 13, 1990)
141-143 -----	112 IBLA 273 (Jan. 4, 1990)
142 -----	113 IBLA 286 (Feb. 13, 1990)
154 -----	112 IBLA 312 (Jan. 10, 1990)
161-284 -----	M-36969, 97 I.D. 54 (1989)
270-1 -----	113 IBLA 80 (Feb. 12, 1990)
	114 IBLA 86 (Apr. 11, 1990)
	115 IBLA 43 (June 12, 1990)
270-1-270-3 -----	113 IBLA 21 (Jan. 29, 1990)
	113 IBLA 80 (Feb. 12, 1990)
	115 IBLA 97 (June 26, 1990)
	115 IBLA 317 (Aug. 7, 1990)
	116 IBLA 145 (Sept. 24, 1990)
	116 IBLA 301 (Oct. 24, 1990)
	116 IBLA 317 (Oct. 29, 1990)
	117 IBLA 148 (Dec. 13, 1990)
270-3 -----	113 IBLA 80 (Feb. 12, 1990)
	115 IBLA 43 (June 12, 1990)
	117 IBLA 148 (Dec. 13, 1990)
291-302 -----	M-36969, 97 I.D. 54 (1989)
315 -----	116 IBLA 32 (Aug. 27, 1990)
315a -----	115 IBLA 69 (June 15, 1990)
	116 IBLA 32 (Aug. 27, 1990)
315a-315r -----	116 IBLA 32 (Aug. 27, 1990)
315c -----	115 IBLA 69 (June 15, 1990)
	115 IBLA 92 (June 21, 1990)
315f -----	112 IBLA 321 (Jan. 12, 1990)
	116 IBLA 29 (Aug. 27, 1990)
321 -----	112 IBLA 321 (Jan. 12, 1990)
	113 IBLA 292 (Mar. 12, 1990)
	114 IBLA 239 (May 7, 1990)
	114 IBLA 380 (May 24, 1990)
	116 IBLA 158 (Sept. 25, 1990)
	116 IBLA 169 (Sept. 26, 1990)
321-329 -----	M-36969, 97 I.D. 54 (1989)
321-339 -----	114 IBLA 239 (May 7, 1990)
322 -----	112 IBLA 321 (Jan. 12, 1990)
	114 IBLA 380 (May 24, 1990)
	116 IBLA 169 (Sept. 26, 1990)
327 -----	114 IBLA 239 (May 7, 1990)
328 -----	116 IBLA 169 (Sept. 26, 1990)
329 -----	116 IBLA 169 (Sept. 26, 1990)
333 -----	116 IBLA 169 (Sept. 26, 1990)
	117 IBLA 13 (Nov. 21, 1990)
334 -----	116 IBLA 169 (Sept. 26, 1990)
	117 IBLA 13 (Nov. 21, 1990)
336 -----	116 IBLA 169 (Sept. 26, 1990)
	117 IBLA 13 (Nov. 21, 1990)



## TITLE 43: Continued

sec. 372	-----	M-36966, 97 I.D. 21 (1989)
		M-36967, 97 I.D. 32 (1989)
374	-----	M-36969, 97 I.D. 54 (1989)
375	-----	M-36969, 97 I.D. 54 (1989)
383	-----	M-36966, 97 I.D. 21 (1989)
		M-36967, 97 I.D. 32 (1989)
387	-----	112 IBLA 312 (Jan. 10, 1990)
389	-----	M-36967, 97 I.D. 32 (1989)
390hh	-----	M-36969, 97 I.D. 54 (1989)
391	-----	M-36969, 97 I.D. 54 (1989)
391 <u>et seq.</u>	-----	M-36969, 97 I.D. 54 (1989)
392	-----	M-36969, 97 I.D. 54 (1989)
391a-1	-----	M-36969, 97 I.D. 54 (1989)
392a	-----	M-36969, 97 I.D. 54 (1989)
394	-----	M-36969, 97 I.D. 54 (1989)
401	-----	M-36969, 97 I.D. 54 (1989)
414	-----	M-36969, 97 I.D. 54 (1989)
416	-----	113 IBLA 393 (Mar. 28, 1990)
471 <u>et seq.</u>	-----	M-36969, 97 I.D. 54 (1989)
485	-----	M-36969, 97 I.D. 54 (1989)
485b	-----	M-36969, 97 I.D. 54 (1989)
485h(c)	-----	M-36969, 97 I.D. 54 (1989)
501	-----	M-36969, 97 I.D. 54 (1989)
504	-----	M-36969, 97 I.D. 54 (1989)
511	-----	M-36967, 97 I.D. 32 (1989)
521	-----	M-36969, 97 I.D. 54 (1989)
522	-----	M-36969, 97 I.D. 54 (1989)
526	-----	M-36969, 97 I.D. 54 (1989)
569	-----	M-36969, 97 I.D. 54 (1989)
569(c)	-----	M-36969, 97 I.D. 54 (1989)
569(d)	-----	M-36969, 97 I.D. 54 (1989)
613	-----	112 IBLA 326 (Jan. 12, 1990)
614	-----	M-36967, 97 I.D. 32 (1989)
614c	-----	M-36967, 97 I.D. 32 (1989)
666	-----	M-36966, 97 I.D. 21 (1989)
682(a)	-----	115 IBLA 105 (June 27, 1990)
687(a)	-----	116 IBLA 203 (Oct. 4, 1990)
732	-----	114 IBLA 377 (May 24, 1990)
		116 IBLA 349 (Oct. 30, 1990)
735	-----	114 IBLA 377 (May 24, 1990)
		116 IBLA 349 (Oct. 30, 1990)
751-774	-----	114 IBLA 177, 97 I.D. 171 (1990)
752	-----	115 IBLA 327 (Aug. 7, 1990)
869	-----	114 IBLA 177, 97 I.D. 171 (1990)
869-869-4	-----	116 IBLA 108 (Sept. 18, 1990)
869-1	-----	116 IBLA 108 (Sept. 18, 1990)
870	-----	113 IBLA 287 (Mar. 12, 1990)



## TITLE 43: Continued

sec. 961 -----	113 IBLA 327 (Mar. 15, 1990)
	114 IBLA 205 (Apr. 24, 1990)
	114 IBLA 399 (May 30, 1990)
	116 IBLA 164 (Sept. 26, 1990)
981 -----	113 IBLA 380 (Mar. 28, 1990)
1068 -----	113 IBLA 8 (Jan. 25, 1990)
	113 IBLA 209 (Feb. 22, 1990)
	113 IBLA 380 (Mar. 28, 1990)
	114 IBLA 302 (May 10, 1990)
1181a -----	116 IBLA 355 (Nov. 5, 1990)
1181a-1181f -----	114 IBLA 51 (Apr. 6, 1990)
	116 IBLA 81 (Sept. 10, 1990)
	116 IBLA 129 (Sept. 21, 1990)
	116 IBLA 355 (Nov. 5, 1990)
1201 -----	114 IBLA 326 (May 22, 1990)
1331-1356 -----	115 IBLA 195 (July 3, 1990)
1333(a)(2)(A) -----	114 IBLA 42 (Apr. 3, 1990)
1334 -----	116 IBLA 152 (Sept. 24, 1990)
	117 IBLA 230 (Dec. 21, 1990)
1334(a) -----	113 IBLA 243 (Mar. 7, 1990)
1335(a)(1)-(11) -----	M-36968, 97 I.D. 49 (1989)
1335(a)(2) -----	M-36968, 97 I.D. 49 (1989)
1335(a)(9) -----	M-36968, 97 I.D. 49 (1989)
1335(b) -----	M-36968, 97 I.D. 49 (1989)
1337 -----	115 IBLA 195 (July 3, 1990)
	115 IBLA 304 (Aug. 7, 1990)
	115 IBLA 393 (Aug. 21, 1990)
1337(a)(1) -----	117 IBLA 230 (Dec. 21, 1990)
1337(g) -----	115 IBLA 62 (June 14, 1990)
1339 -----	113 IBLA 30, 97 I.D. 11 (1990)
	116 IBLA 176, 97 I.D. 239 (1990)
1339(a) -----	113 IBLA 30, 97 I.D. 11 (1990)
	113 IBLA 186 (Feb. 15, 1990)
	114 IBLA 28 (Apr. 3, 1990)
	116 IBLA 67 (Sept. 5, 1990)
	116 IBLA 176, 97 I.D. 239 (1990)
	117 IBLA 120 (Dec. 3, 1990)
	117 IBLA 125 (Dec. 3, 1990)
1339(b) -----	114 IBLA 28 (Apr. 3, 1990)
1344(a)(4) -----	117 IBLA 230 (Dec. 21, 1990)
1411 -----	115 IBLA 214 (July 3, 1990)
1411-1418 -----	115 IBLA 214 (July 3, 1990)
1412 -----	115 IBLA 214 (July 3, 1990)
1414 -----	115 IBLA 214 (July 3, 1990)
1601-1624 -----	116 IBLA 301 (Oct. 24, 1990)
1601(a) -----	113 IBLA 218 (Feb. 27, 1990)
1602(e) -----	115 IBLA 249 (July 19, 1990)
1610 -----	113 IBLA 218 (Feb. 27, 1990)
	115 IBLA 301 (Aug. 6, 1990)



## TITLE 43: Continued

sec. 1610(a) -----	113	IBLA	334	(Mar. 20, 1990)
1610(a)(1) -----	115	IBLA	301	(Aug. 6, 1990)
1610(b)(3) -----	115	IBLA	301	(Aug. 6, 1990)
1611 -----	113	IBLA	334	(Mar. 20, 1990)
	115	IBLA	301	(Aug. 6, 1990)
1611(a)(3) -----	113	IBLA	86	(Feb. 13, 1990)
1611(b) -----	113	IBLA	218	(Feb. 27, 1990)
	113	IBLA	334	(Mar. 20, 1990)
1612 -----	113	IBLA	86	(Feb. 13, 1990)
1613(a) -----	115	IBLA	301	(Aug. 6, 1990)
1613(g) -----	115	IBLA	301	(Aug. 6, 1990)
1613(h)(1) -----	115	IBLA	249	(July 19, 1990)
	115	IBLA	257	(July 19, 1990)
1615 -----	115	IBLA	301	(Aug. 6, 1990)
1616(d)(1) -----	113	IBLA	86	(Feb. 13, 1990)
1617 -----	114	IBLA	86	(Apr. 11, 1990)
	116	IBLA	301	(Oct. 24, 1990)
1617(a) -----	113	IBLA	21	(Jan. 29, 1990)
	113	IBLA	80	(Feb. 12, 1990)
	115	IBLA	43	(June 12, 1990)
	115	IBLA	317	(Aug. 7, 1990)
	116	IBLA	145	(Sept. 24, 1990)
	116	IBLA	317	(Oct. 29, 1990)
	117	IBLA	148	(Dec. 13, 1990)
1634 -----	113	IBLA	80	(Feb. 12, 1990)
	114	IBLA	86	(Apr. 11, 1990)
	115	IBLA	43	(June 12, 1990)
1634(a) -----	115	IBLA	43	(June 12, 1990)
	115	IBLA	317	(Aug. 7, 1990)
	116	IBLA	145	(Sept. 24, 1990)
	116	IBLA	305	(Oct. 29, 1990)
1634(a)(1) -----	115	IBLA	43	(June 12, 1990)
	116	IBLA	301	(Oct. 24, 1990)
1634(a)(4) -----	113	IBLA	80	(Feb. 12, 1990)
	115	IBLA	317	(Aug. 7, 1990)
	116	IBLA	301	(Oct. 24, 1990)
	117	IBLA	148	(Dec. 13, 1990)
1634(a)(5) -----	115	IBLA	43	(June 12, 1990)
1634(a)(5)(B) -----	116	IBLA	317	(Oct. 29, 1990)
1634(a)(5)(C) -----	115	IBLA	43	(June 12, 1990)
1634(b) -----	117	IBLA	148	(Dec. 13, 1990)
1634(c) -----	115	IBLA	317	(Aug. 7, 1990)
	116	IBLA	305	(Oct. 29, 1990)
1634(e) -----	115	IBLA	43	(June 12, 1990)
	116	IBLA	305	(Oct. 29, 1990)
1635 -----	116	IBLA	41	(Aug. 28, 1990)
1635(e) -----	113	IBLA	86	(Feb. 13, 1990)
1635(f) -----	116	IBLA	41	(Aug. 28, 1990)
1701 -----	114	IBLA	326	(May 22, 1990)



## TITLE 43: Continued

sec. 1701-1782 -----	114	IBLA 8, 97 I.D. 125 (1990)
1701-1784 -----	115	IBLA 214 (July 3, 1990)
	116	IBLA 355 (Nov. 5, 1990)
1701(a)(7) -----	112	IBLA 293 (Jan. 9, 1990)
1701(a)(9) -----	113	IBLA 76 (Feb. 9, 1990)
	114	IBLA 135 (Apr. 18, 1990)
1702(a) -----	116	IBLA 47 (Sept. 5, 1990)
1709(9) -----	115	IBLA 92 (June 12, 1990)
1702(h) -----	112	IBLA 293 (Jan. 9, 1990)
1712(c)(3) -----	115	IBLA 359 (Aug. 14, 1990)
1714 -----	114	IBLA 216 (Apr. 25, 1990)
1714(a) -----	114	IBLA 216 (Apr. 15, 1990)
1714( <u>l</u> ) -----	116	IBLA 105 (Sept. 17, 1990)
1716 -----	114	IBLA 393 (May 30, 1990)
1721 -----	114	IBLA 177, 97 I.D. 171 (1990)
1732 -----	113	IBLA 321 (Mar. 14, 1990)
	113	IBLA 376 (Mar. 28, 1990)
	114	IBLA 326 (May 22, 1990)
	115	IBLA 92 (June 21, 1990)
	116	IBLA 108 (Sept. 18, 1990)
1732(a) -----	116	IBLA 355 (Nov. 5, 1990)
1732(b) -----	113	IBLA 1 (Jan. 25, 1990)
	113	IBLA 321 (Mar. 14, 1990)
	114	IBLA 135 (Apr. 18, 1990)
	115	IBLA 92 (June 21, 1990)
1732(c) -----	116	IBLA 108 (Sept. 18, 1990)
1733(a) -----	113	IBLA 396 (Mar. 28, 1990)
1733(g) -----	113	IBLA 396 (Mar. 28, 1990)
1734 -----	117	IBLA 96 (Dec. 3, 1990)
1744 -----	113	IBLA 235 (Feb. 28, 1990)
	113	IBLA 280 (Mar. 12, 1990)
	113	IBLA 287 (Mar. 12, 1990)
	114	IBLA 221 (Apr. 25, 1990)
	114	IBLA 323 (May 22, 1990)
	115	IBLA 102 (June 26, 1990)
	115	IBLA 277 (July 26, 1990)
	115	IBLA 312 (Aug. 7, 1990)
	116	IBLA 222 (Oct. 4, 1990)
	116	IBLA 257 (Oct. 17, 1990)
1744(a) -----	112	IBLA 281 (Jan. 5, 1990)
1744(a)(2) -----	114	IBLA 323 (May 22, 1990)
1744(b) -----	112	IBLA 281 (Jan. 5, 1990)
	113	IBLA 387 (Mar. 28, 1990)
	113	IBLA 299, 97 I.D. 109 (1990)
	115	IBLA 102 (June 26, 1990)



## TITLE 43: Continued

sec. 1744(c) -----	113	IBLA	235	(Feb. 28, 1990)
	113	IBLA	280	(Mar. 12, 1990)
	113	IBLA	299,	97 I.D. 109 (1990)
	114	IBLA	221	(Apr. 25, 1990)
	114	IBLA	323	(May 22, 1990)
	115	IBLA	102	(June 26, 1990)
	116	IBLA	222	(Oct. 4, 1990)
1744(1) -----	113	IBLA	393	(Mar. 28, 1990)
1746 -----	116	IBLA	203	(Oct. 4, 1990)
1751-1753 -----	116	IBLA	32	(Aug. 27, 1990)
1752(c)(3) -----	115	IBLA	69	(June 15, 1990)
1761 -----	112	IBLA	369	(Jan. 19, 1990)
	113	IBLA	239	(Feb. 28, 1990)
	113	IBLA	327	(Mar. 15, 1990)
	114	IBLA	8,	97 I.D. 125 (1990)
	114	IBLA	336	(May 22, 1990)
	115	IBLA	1	(May 30, 1990)
	115	IBLA	347	(Aug. 13, 1990)
	116	IBLA	63	(Sept. 5, 1990)
	116	IBLA	164	(Sept. 26, 1990)
	116	IBLA	225	(Oct. 12, 1990)
1761-1771 -----	113	IBLA	61	(Feb. 7, 1990)
	113	IBLA	264	(Mar. 9, 1990)
	113	IBLA	367	(Mar. 27, 1990)
	114	IBLA	135	(Apr. 18, 1990)
	115	IBLA	117	(June 27, 1990)
	115	IBLA	239	(July 18, 1990)
	116	IBLA	225	(Oct. 12, 1990)
	117	IBLA	138	(Dec. 6, 1990)
1761(a) -----	113	IBLA	250	(Mar. 8, 1990)
	115	IBLA	347	(Aug. 13, 1990)
	117	IBLA	138	(Dec. 6, 1990)
1761(a)(6) -----	113	IBLA	250	(Mar. 8, 1990)
	117	IBLA	138	(Dec. 6, 1990)
1761(a)(7) -----	113	IBLA	250	(Mar. 8, 1990)
1761(b)(1) -----	113	IBLA	239	(Feb. 28, 1990)
1763 -----	113	IBLA	250	(Mar. 8, 1990)
1764(g) -----	113	IBLA	264	(Mar. 9, 1990)
	113	IBLA	367	(Mar. 27, 1990)
	114	IBLA	135	(Apr. 18, 1990)
	114	IBLA	336	(May 22, 1990)
	115	IBLA	117	(June 27, 1990)
	115	IBLA	239	(July 18, 1990)
	116	IBLA	225	(Oct. 12, 1990)
	117	IBLA	51	(Nov. 27, 1990)
	117	IBLA	138	(Dec. 6, 1990)
1765 -----	114	IBLA	8,	97 I.D. 125 (1990)
1766 -----	114	IBLA	336	(May 22, 1990)



## TITLE 43: Continued

sec. 1781 -----	116 IBLA 47 (Sept. 5, 1990)
	116 IBLA 210 (Oct. 4, 1990)
1781(d) -----	116 IBLA 210 (Oct. 4, 1990)
1781(f) -----	116 IBLA 210 (Oct. 4, 1990)
1782 -----	112 IBLA 287 (Jan. 5, 1990)
	114 IBLA 163 (Apr. 19, 1990)
	116 IBLA 210 (Oct. 4, 1990)
1782(a) -----	116 IBLA 230 (Oct. 16, 1990)
1782(c) -----	112 IBLA 287 (Jan. 5, 1990)
	114 IBLA 8, 97 I.D. 125 (1990)
	114 IBLA 163 (Apr. 19, 1990)
	116 IBLA 84 (Sept. 17, 1990)
	116 IBLA 210 (Oct. 4, 1990)
	116 IBLA 230 (Oct. 16, 1990)
	116 IBLA 288 (Oct. 23, 1990)
1903(b) -----	115 IBLA 69 (June 15, 1990)
4332(2)(C) -----	115 IBLA 88 (June 21, 1990)

## TITLE 44:

sec. 1507 -----	113 IBLA 214 (Feb. 23, 1990)
	114 IBLA 340 (May 22, 1990)
	115 IBLA 43 (June 12, 1990)
1510 -----	115 IBLA 43 (June 12, 1990)

## TITLE 48:

sec. 21 -----	116 IBLA 301 (Oct. 24, 1990)
354a -----	113 IBLA 21 (Jan. 29, 1990)

## TITLE 49:

sec. 211-213 -----	113 IBLA 387 (Mar. 28, 1990)
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#### ACCOUNTS

(See also Fees, Funds, Payments)

#### PAYMENTS

A company check for oil and gas lease bid deposit is not an acceptable form of remittance under 43 CFR 3120.4-1 (1987), which requires remittances to be submitted in the form specified in the competitive sale notice, where that notice requires bidders to submit a bid deposit "by guaranteed remittance, i.e., cash, cashier's check, or money order."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

An unsigned check is not a negotiable instrument pursuant to the Uniform Commercial Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check since, by definition, such an unsigned check is not a negotiable instrument.

Burton/Hawks, Inc., 115 IBLA 143 (June 28, 1990)

#### ACT OF FEBRUARY 8, 1887

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)



ACT OF JUNE 17, 1902

The requirement of the Acquired Lands Act, 36 Stat. 895, that mineral leasing revenues be distributed "to the same funds or accounts and in the same manner as other receipts from the land affected by the lease" is most fully met for mineral revenues from acquired reclamation lands that have been charged to the reimbursable component of a project by the "credit to the project" disbursement formula. When revenues are generated from acquired lands which have not been charged to a project, a general credit to the Reclamation fund is appropriate. A credit to the annual obligations of the project is not appropriate for mineral leasing revenues from acquired lands because future use of the subsec. I annual credit method was cut off by the Hayden-O'Mahoney Amendment of 1938, 52 Stat. 322, except where such treatment was grandfathered in under that amendment.

Credits created by the statutory disbursement of mineral leasing revenues to projects may be used to satisfy new construction obligations in the same manner that such credits were applied against past obligations.

Proper Disbursement & Crediting of Mineral Leasing Revenues from Reclamation Acquired Lands, M-36969  
(Sept. 8, 1989) 97 I.D. 54

ACT OF NOVEMBER 9, 1921

Those portions of mining claims located on land subject to a valid, ongoing, and pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)



ADMINISTRATIVE AUTHORITY

(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior)

GENERALLY

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

Withdrawal of patent applications following a hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)



ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164  
(June 28, 1990)



ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415 to resolve questions of fact concerning applicant's alleged occupancy on the crucial date.

Larry L. Ledlow, Florence Ledlow, 116 IBLA 349  
(Oct. 30, 1990)

ESTOPPEL

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA  
225 (Apr. 26, 1990)

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of



ADMINISTRATIVE AUTHORITY--Continued

ESTOPPEL--Continued

lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

LACHES

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

ADMINISTRATIVE PRACTICE.

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the



ADMINISTRATIVE PRACTICE--Continued

Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

When issuing a formal decision one must do more than ensure that the decision is supported by a rational basis. The basis for that decision must be stated in the written decision and demonstrated in the administrative record accompanying the decision. The recipient of the decision deserves a reasoned and factual explanation of the rationale for the decision, and must be given some basis for understanding it and accepting it or, alternatively, for appealing and disputing it.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to



ADMINISTRATIVE PRACTICE--Continued

appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

MMS must provide a lessee with an adequate basis for accepting or appealing a determination of the manufacturing allowance to be utilized in royalty calculation. An MMS decision must be supported by a rational basis which is stated in the written decision and supported by the record.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

As a general rule, adjudications should be so structured that determinations of subsidiary or inter-related questions are made within the confines of a single unified decision so as to avoid needless multiplicity of appeals and the resulting confusion which piecemeal adjudication engenders.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243



#### ADMINISTRATIVE PROCEDURE

(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice)

#### GENERALLY

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)



ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary--Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs and the issuance of a new decision.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

Withdrawal of patent applications following a hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack



ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317  
(May 14, 1990)

When the reason for denial of an application to modify a loan under the Indian Revolving Loan Program is not given in the denial decision, the decision will be vacated and the matter remanded for further proceedings.

Lyle Cochran v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 406 (Aug. 21, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)



## ADMINISTRATIVE PROCEDURE--Continued

### GENERALLY--Continued

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263

### ADJUDICATION

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109



## ADMINISTRATIVE PROCEDURE--Continued

### ADJUDICATION--Continued

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor),  
113 IBLA 352 (Mar. 22, 1990)

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for



ADMINISTRATIVE PROCEDURE--Continued

ADJUDICATION--Continued

concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Withdrawal of patent applications following a hearing but before a decision on the merits concerning the validity of the claims which were the subject of the hearing eliminated the subject matter on which the Administrative Law Judge's jurisdiction to render a decision was founded. Dismissal of a protest for lack of subject matter jurisdiction is not a decision on the merits and is therefore made without prejudice.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

As a general rule, adjudications should be so structured that determinations of subsidiary or inter-related questions are made within the confines of a single unified decision so as to avoid needless multiplicity of appeals and the resulting confusion which piecemeal adjudication engenders.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243



## ADMINISTRATIVE PROCEDURE--Continued

### ADMINISTRATIVE LAW JUDGES

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

### ADMINISTRATIVE PROCEDURE ACT

Although rulemaking procedures at 5 U.S.C. § 553 (1982), do not apply to interpretive rules, 5 U.S.C. § 552 (1982), requires publication in the Federal Register of statements of general policy and interpretations of general applicability.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

### ADMINISTRATIVE RECORD

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

When the administrative record in an appeal from a Bureau of Indian Affairs decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

When a notice of appeal to the Board of Land Appeals from a decision of the Director, MMS, is filed, MMS is required to submit the complete, original case file, containing all documents relating to the dispute at hand.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of a notice of appeal.

Patrick G. Blumm, dba Rio Grande Rapid Transit, 116 IBLA 321 (Oct. 29, 1990)

Where a Bureau of Indian Affairs Area Director denies an application for a loan under the Indian Revolving Loan Fund on the grounds that the financial condition of the applicant is inadequate to provide a reasonable prospect of repayment, the administrative record should show how the Area Director reached his conclusions concerning the applicant's financial condition.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 69 (Nov. 15, 1990)



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Uintah Mountain Club, 112 IBLA 287 (Jan. 5, 1990)

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co., 114 IBLA 280 (May 9, 1990)

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference to discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources and denial of a conference in the latter context entails no reversible error.

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164  
(June 28, 1990)

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short term order, capable of repetition, yet evading review.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)



ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

BURDEN OF PROOF

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Morana Cheepo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 131 (Feb. 1, 1990)

Louis Kahan & the Louis Kahan Trust v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 180 (Mar. 2, 1990)



ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

Little Shell Tribe of Chippewa Indians of Montana v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 282 (May 8, 1990)

Leonard & Ellen Pueblo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 350 (July 6, 1990)

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)



ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

A party challenging BLM's rejection of a cemetery site selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management



ADMINISTRATIVE PROCEDURE--Continued

BURDEN OF PROOF--Continued

plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

In re Grassy Overlook Timber Sale, 115 IBLA 359  
(Aug. 14, 1990)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

Thomas J. Sweeney v. Acting Anadarko Area Director, Bureau of Indian Affairs, 19 IBIA 101 (Nov. 29, 1990)



## ADMINISTRATIVE PROCEDURE--Continued

### BURDEN OF PROOF--Continued

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

### DECISIONS

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)



ADMINISTRATIVE PROCEDURE--Continued

DECISIONS--Continued

When issuing a formal decision one must do more than ensure that the decision is supported by a rational basis. The basis for that decision must be stated in the written decision and demonstrated in the administrative record accompanying the decision. The recipient of the decision deserves a reasoned and factual explanation of the rationale for the decision, and must be given some basis for understanding it and accepting it or, alternatively, for appealing and disputing it.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

When a mineral locator has filed a location certificate with BLM within 90 days of the date of the location of the claim as required by 43 U.S.C. § 1744(b) (1982), it is error for BLM to later reject the recordation of the claim. BLM's decision cannot change the fact the locator has complied with the statute. The fact the claim has been recorded with BLM, however, does not establish its validity.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109



## ADMINISTRATIVE PROCEDURE--Continued

### DECISIONS--Continued

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

### HEARINGS

Mining claims located on lands closed to mineral entry are null and void ab initio and no property



ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)



ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

Sealaska Corp., 115 IBLA 257 (July 19, 1990)



ADMINISTRATIVE PROCEDURE--Continued

HEARINGS--Continued

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415 to resolve questions of fact concerning applicant's alleged occupancy on the crucial date.

Larry L. Ledlow, Florence Ledlow, 116 IBLA 349  
(Oct. 30, 1990)

RULEMAKING

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243



ADMINISTRATIVE PROCEDURE--Continued

STANDING

Standing to appeal requires that an appellant be both a party to the decision appealed from and adversely affected by the decision. To be adversely affected, an appellant must have a legally cognizable interest in the land at issue.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

A person who is not a party to a lease of trust or restricted Indian lands lacks standing to challenge actions taken by the Bureau of Indian Affairs in the management of the lease.

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 222 (Mar. 28, 1990)

An individual Indian landowner's standing to bring an appeal in a matter concerning Indian lands is limited to her own ownership interest unless she has been authorized by other landowners to represent them and is a qualified representative under 43 CFR 1.3.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)



ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

An unorganized group lacks standing to bring an appeal under 25 CFR Part 2.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial standing determinations.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)



## AIRPORTS

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

## ALASKA

### GENERALLY

A notice of location filed in 1902 claiming occupancy of certain lands in Alaska is not a document conveying title. All possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy.

Heirs of Skookum John, 115 IBLA 97 (June 26, 1990)

### ALASKA NATIVE CLAIMS SETTLEMENT ACT

The Department of the Interior is part of the Executive branch of Government and is duty bound to carry out instructions of Congress enacted as law. The Board of Land Appeals has no authority to declare Acts of Congress invalid, unconstitutional, without authority, or otherwise improper. The Board is bound by the provisions of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" which have become law by virtue of congressional ratification.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)



## ALASKA--Continued

### IRRIGATION AND POWER

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

### LAND GRANTS AND SELECTIONS

Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when and if the selection is tentatively approved. Where an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

Weston B. Andrews, 116 IBLA 41 (Aug. 28, 1990)

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec.



ALASKA--Continued

LAND GRANTS AND SELECTIONS--Continued

905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

NATIVE ALLOTMENTS

A selection application filed by the Territory of Alaska pursuant to the Act of Jan. 21, 1929, formerly codified at 48 U.S.C. § 354a (1952), segregated the land from subsequent appropriations based upon settlement and location. A Native allotment application is properly rejected when the Native was born after the selection application was filed.

Patrick L. Philpott, 113 IBLA 21 (Jan. 29, 1990)

Where the record in a Native allotment case contains evidence refuting the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

State of Alaska, 113 IBLA 80 (Feb. 12, 1990)

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

Where legislative approval of a Native allotment was prevented by timely and effective state protest,



ALASKA--Continued

NATIVE ALLOTMENTS--Continued

adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a protest filed more than 180 days after the enactment of ANILCA must be dismissed and such a protest does not relate back to objections made prior to ANILCA, which were considered by the Bureau of Land Management.

Thelma M. Eckert, 115 IBLA 43 (June 12, 1990)



ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if BLM rejected a Native allotment application without first affording the applicant an opportunity for a hearing before a trier of fact, the decision to reject is not final, and the application was pending before the Department on Dec. 18, 1971. BLM erred in rejecting a request by the heirs of the applicant that the Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Heirs of Saul Sockpealuk, Heirs of Carl Takak, Heirs of Silas Sockpealuk, 115 IBLA 317 (Aug. 7, 1990)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1961 and closed in 1967 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Michael Gloko, 116 IBLA 145 (Sept. 24, 1990)



ALASKA--Continued

NATIVE ALLOTMENTS--Continued

The Administrative Law Judge properly determined that relinquishment of a Native allotment application was not knowing and voluntary. The language of a letter accompanying relinquishment, the request for BLM advice, and testimony at a subsequent hearing demonstrated that the relinquishing applicant did not grasp the full legal consequences of executing a relinquishment.

A reinstated Native allotment application will not be legislatively approved if legislative approval would effect a taking of an asserted valid existing right without providing the holder notice and the opportunity for a hearing.

Katherine C. (Zimin) Atkins v. Bureau of Land Management, Bristol Bay Housing Authority (Intervenor),  
116 IBLA 305 (Oct. 29, 1990)

Where subsequent to approval of a Native allotment but prior to issuance by BLM of the document conveying legal title to the allottee, the allottee, as grantor, grants to the State of Alaska a public highway easement across her allotment, a request by the State to have that easement excluded from or reserved in the document conveying legal title will be denied.

State of Alaska, Dept. of Transportation & Public Facilities, 116 IBLA 317 (Oct. 29, 1990)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land



ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

State of Alaska, 117 IBLA 148 (Dec. 13, 1990)

POSSESSORY RIGHTS

A notice of location filed in 1902 claiming occupancy of certain lands in Alaska is not a document conveying title. All possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy.

Heirs of Skookum John, 115 IBLA 97 (June 26, 1990)

STATEHOOD ACT

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)



## ALASKA--Continued

### TOWNSITES

The regulation at 43 CFR 2565.7, governing conveyance of residual townsite lots which are unoccupied at the time of subdivisional survey, provides for conveyance to the municipality upon proof of incorporation. Application of this regulation to preclude conveyance to an unincorporated Native village has been held inconsistent with the Native Townsite Act and, hence, the regulation is not properly applied to the Native townsites to bar conveyance to the Native village.

Native Village of Circle, 114 IBLA 377 (May 24, 1990)

Where the record is too vague to support a townsite trustee's determination that applicants for certain townsite lots did not occupy those lots prior to repeal of the Townsite Acts on Oct. 21, 1976, and hence did not qualify for trustee deeds to those lots, the Board will order a hearing pursuant to 43 CFR 4.415 to resolve questions of fact concerning applicant's alleged occupancy on the crucial date.

Larry L. Ledlow, Florence Ledlow, 116 IBLA 349 (Oct. 30, 1990)

### TRADE AND MANUFACTURING SITES

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing



ALASKA--Continued

TRADE AND MANUFACTURING SITES--Continued

owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)



## ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

### GENERALLY--Continued

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a protest filed more than 180 days after the enactment of ANILCA must be dismissed and such a protest does not relate back to objections made prior to ANILCA, which were considered by the Bureau of Land Management.

Thelma M. Eckert, 115 IBLA 43 (June 12, 1990)

### NATIVE ALLOTMENTS

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

### STATE SELECTIONS

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act,



ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

STATE SELECTIONS--Continued

43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

CONVEYANCES

Cemetery Sites and Historical Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A cemetery site application is properly rejected under 43 CFR 2653.5 when there is no evidence that the site is the burial place of one or more Natives.

A party challenging BLM's rejection of a cemetery site selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Cemetery Sites and Historical Places--Continued

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

A party challenging BLM's rejection of its historical place selection application under sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), bears the burden of establishing by a preponderance of the evidence that such rejection is in error.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

Interim Conveyance

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Interim Conveyance--Continued

(1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

DEFINITIONS

Public Lands

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). The excepted land must be in actual use on Dec. 18, 1971, and throughout the selection period. Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by a non-Governmental entity is properly excluded from conveyance if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue. A decision to exclude a tract may be reversed where it appears from the record that use of the tract was no longer required by the purposes of the Federal agency.

Eyak Corp., 113 IBLA 334 (Mar. 20, 1990)



## ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

### NATIVE LAND SELECTIONS

#### Selection Limitations

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). The excepted land must be in actual use on Dec. 18, 1971, and throughout the selection period. Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by a non-Governmental entity is properly excluded from conveyance if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue. A decision to exclude a tract may be reversed where it appears from the record that use of the tract was no longer required by the purposes of the Federal agency.

Evak Corp., 113 IBLA 334 (Mar. 20, 1990)

#### State-Selected Lands

A State of Alaska selection application which expressly states that it excludes prior claims does not select land described by a Native allotment application previously filed with the Bureau of Land Management, and therefore does not qualify under subsec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(4) (1988), so as to preclude legislative approval of the allotment application under subsec. 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988), and require adjudication under the Native Allotment Act.

State of Alaska, 116 IBLA 301 (Oct. 24, 1990)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Village Selections

The Department of the Interior is part of the Executive branch of Government and is duty bound to carry out instructions of Congress enacted as law. The Board of Land Appeals has no authority to declare Acts of Congress invalid, unconstitutional, without authority, or otherwise improper. The Board is bound by the provisions of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" which have become law by virtue of congressional ratification.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

WITHDRAWALS AND RESERVATIONS

Withdrawals for Native Selection

Generally

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

State-Selected Lands

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)



#### APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970)

#### GENERALLY

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

Matilda Arviso et al. v. Ass't Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 118 (Jan. 18, 1990)

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

Under the circumstances of this case, the time for filing a notice of appeal was tolled during the time the Bureau of Indian Affairs Superintendent and the party adversely affected by the Superintendent's



APPEALS--Continued

GENERALLY--Continued

decision were engaged in discussions pursuant to a request to rescind the decision.

New Mexico Highway & Transportation Dept. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 165 (Feb. 23, 1990)

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

Regulations promulgated by the Bureau of Indian Affairs at 25 CFR 2.10 (1988) establish a 30-day period for filing a notice of appeal.

Badger Oil Corp. & Ute Indian Tribe of the Uintah & Ouray Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 174 (Mar. 1, 1990)

This Department will not entertain review of an appeal from a determination that land located by a mineral claimant was not Federally owned where the appeal is made under circumstances indicating that an opinion is sought to facilitate issuance of a lease to the same land from the state and where appellant fails to point to error in the BLM decision appealed from.

George McDevitt, 113 IBLA 287 (Mar. 12, 1990)



APPEALS--Continued

GENERALLY--Continued

Notification given to a lessee by the Bureau of Indian Affairs that a lease has expired by its own terms is an appealable action within the meaning of 25 CFR 2.2.

Bekco Oil & Gas Corp. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 202 (Mar. 26, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber sale could be recurring, where it is not evasive of review, a motion to dismiss for mootness may be granted.

In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (Apr. 6, 1990)

Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her



APPEALS--Continued

GENERALLY--Continued

estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)



APPEALS--Continued

GENERALLY--Continued

An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. A person filing an appeal has the responsibility of showing that he is qualified under the regulation to represent the appellant.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A notice of appeal from an action or decision of a Bureau of Indian Affairs official that is not timely filed with the Board of Indian Affairs will be dismissed for lack of jurisdiction in accordance with 43 CFR 4.332(a).

Louis Sequoyah Locust v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 286 (May 8, 1990)

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)



## APPEALS--Continued

### GENERALLY--Continued

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co.,  
114 IBLA 280 (May 9, 1990)

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference to discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources



APPEALS--Continued

GENERALLY--Continued

and denial of a conference in the latter context entails no reversible error.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)



## APPEALS--Continued

### GENERALLY--Continued

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed.

San Juan Citizens Alliance, Western Colorado Congress,  
114 IBLA 366 (May 24, 1990)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA  
69 (June 15, 1990)

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to



APPEALS--Continued

GENERALLY--Continued

the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Associations of users of the California Desert Conservation Area who have participated in decisionmaking have standing to appeal a decision establishing motor vehicle travel routes in and around the Afton Canyon area of critical environmental concern.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where



APPEALS--Continued

GENERALLY--Continued

issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)



## APPEALS--Continued

### GENERALLY--Continued

If, during the course of an appeal to the Board of Indian Appeals, the Bureau of Indian Affairs determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions are taken through the filing of an appropriate document with the Board.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263



## APPEALS--Continued

### GENERALLY--Continued

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

### JURISDICTION

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under



APPEALS--Continued

JURISDICTION--Continued

43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)



## APPEALS--Continued

### JURISDICTION--Continued

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

### APPLICATION FOR PERMIT TO DRILL

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)



## APPLICATIONS AND ENTRIES

### GENERALLY

The lands listed as subject to lease under the "Hardrock Minerals Leasing" regulations at 43 CFR 3560.3 and 43 CFR Part 3580 are the only areas which have been made subject to hardrock mineral leasing as a result of either the exercise of Secretarial discretion or Congressional directive. BLM may properly reject an application for a prospecting permit for hardrock minerals when the lands described in the application are not subject to the issuance of a hardrock mineral lease.

Gold and silver on public domain lands are generally not subject to mineral leasing, but may be claimed only under the authority of the Mining Act of 1872, subject to the availability of the lands to mineral entry.

William Bade, 112 IBLA 312 (Jan. 10, 1990)

### RELINQUISHMENT

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

The Administrative Law Judge properly determined that relinquishment of a Native allotment application was not knowing and voluntary. The language of a letter accompanying relinquishment, the request for BLM advice, and testimony at a subsequent hearing demonstrated that the relinquishing applicant did not grasp



## APPLICATIONS AND ENTRIES--Continued

### RELINQUISHMENT--Continued

the full legal consequences of executing a relinquishment.

Katherine C. (Zimin) Atkins v. Bureau of Land Management, Bristol Bay Housing Authority (Intervenor),  
116 IBLA 305 (Oct. 29, 1990)

## APPRAISALS

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

Keith P. Carpenter (On Reconsideration), 113 IBLA 27 (Jan. 30, 1990)



APPRAISALS--Continued

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

An appraisal of fair market rental value for an agricultural lease site will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Phyllis E. Lewis, 113 IBLA 376 (Mar. 28, 1990)

An appraisal of fair market rental value will be affirmed unless an appellant either demonstrates error in the appraisal method or presents convincing evidence that the charges are excessive. Generally, it is proper to use the comparable lease appraisal method for determining fair market rental value of nonlinear land use. However, a comparable lease appraisal may be set aside and the case remanded if it appears from the record that the use of the lands designated as comparable significantly differs from the intended use of the subject site.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)



APPRAISALS--Continued

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

Wapato Orchard Partnership v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 254 (Apr. 24, 1990)

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined



APPRAISALS--Continued

the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Southern Pacific Transportation Co., 115 IBLA 239 (July 18, 1990)



#### APPRAISALS--Continued

An appraisal will be affirmed where no error was shown in the appraisal which used market data to establish annual fair market rental value for an irrigation pond right-of-way where it was not proved that the appraised rental was excessive.

James E. Payne & Evon Payne, 115 IBLA 294 (July 26, 1990)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Southern Pacific Transportation Co., 116 IBLA 164 (Sept. 26, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)



#### APPRAISALS--Continued

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

#### ATTORNEY FEES

##### GENERALLY

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay tribal attorney's fees is a decision based on the exercise of discretion.

Walker River Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 109 (Jan. 17, 1990)

An appellant may be a prevailing party even if its award in the underlying litigation is based on contract principles unrelated to the theory of the case propounded by its attorney. Where only one claim is involved, the appellant can be a prevailing party for the purposes of the EAJA regardless of the basis of the Board's award.

The test of substantial justification of the Government's position for EAJA purposes is not its traditional view or the consistency of its position but how fair and reasonable it was in its evaluation of the appellant's claim.

Reasonable and necessary expenses of an attorney incurred or paid in preparation for the adjudication of



## ATTORNEY FEES--Continued

### GENERALLY--Continued

the specific case before the Board, which expenses are those customarily charged to the client where the case is tried, are allowable expenses under the EAJA. The quantum and method of proof of each allowable expense is discretionary with the Board.

Expenses incurred before a contracting officer's decision denying a claim, and therefore prior to the appeal, may be awarded under the EAJA if they are primarily related to, intended for, and necessary in the subsequent adversary adjudication, rather than intended primarily in support of the claim initially presented to the contracting officer.

Application for Attorney Fees, R&R Enterprises, IBCA-  
2664-F (June 14, 1990) 97 I.D. 185

## EQUAL ACCESS TO JUSTICE ACT

### Generally

An appellant may be a prevailing party even if its award in the underlying litigation is based on contract principles unrelated to the theory of the case propounded by its attorney. Where only one claim is involved, the appellant can be a prevailing party for the purposes of the EAJA regardless of the basis of the Board's award.

The test of substantial justification of the Government's position for EAJA purposes is not its traditional view or the consistency of its position but how fair and reasonable it was in its evaluation of the appellant's claim.

Reasonable and necessary expenses of an attorney incurred or paid in preparation for the adjudication of the specific case before the Board, which expenses are those customarily charged to the client where the case is tried, are allowable expenses under the EAJA. The



ATTORNEY FEES--Continued

EQUAL ACCESS TO JUSTICE ACT--Continued

Generally--Continued

quantum and method of proof of each allowable expense is discretionary with the Board.

Expenses incurred before a contracting officer's decision denying a claim, and therefore prior to the appeal, may be awarded under the EAJA if they are primarily related to, intended for, and necessary in the subsequent adversary adjudication, rather than intended primarily in support of the claim initially presented to the contracting officer.

Application for Attorney Fees, R&R Enterprises, IBCA-  
2664-F (June 14, 1990) 97 I.D. 185

Adversary Adjudication

Reasonable and necessary expenses of an attorney incurred or paid in preparation for the adjudication of the specific case before the Board, which expenses are those customarily charged to the client where the case is tried, are allowable expenses under the EAJA. The quantum and method of proof of each allowable expense is discretionary with the Board.

Expenses incurred before a contracting officer's decision denying a claim, and therefore prior to the appeal, may be awarded under the EAJA if they are primarily related to, intended for, and necessary in the subsequent adversary adjudication, rather than intended primarily in support of the claim initially presented to the contracting officer.

Application for Attorney Fees, R&R Enterprises, IBCA-  
2664-F (June 14, 1990) 97 I.D. 185



ATTORNEY FEES--Continued

EQUAL ACCESS TO JUSTICE ACT--Continued

Prevailing Party

An appellant may be a prevailing party even if its award in the underlying litigation is based on contract principles unrelated to the theory of the case propounded by its attorney. Where only one claim is involved, the appellant can be a prevailing party for the purposes of the EAJA regardless of the basis of the Board's award.

Application for Attorney Fees, R&R Enterprises, IBCA-  
2664-F (June 14, 1990) 97 I.D. 185

Substantially Justified

The test of substantial justification of the Government's position for EAJA purposes is not its traditional view or the consistency of its position but how fair and reasonable it was in its evaluation of the appellant's claim.

Application for Attorney Fees, R&R Enterprises, IBCA-  
2664-F (June 14, 1990) 97 I.D. 185

BOARD OF INDIAN APPEALS

GENERALLY

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short term order, capable of repetition, yet evading review.



BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

Beverly A. Smalley et al. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 459 (Sept. 27, 1990)

The Board of Indian Appeals serves to provide independent, objective administrative review of decisions of Bureau of Indian Affairs' officials and to prevent the politicization of those decisions.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)



BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

An unorganized group lacks standing to bring an appeal under 25 CFR Part 2.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63  
(Nov. 14, 1990)

JURISDICTION

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105  
(Jan. 17, 1990)

The Board of Indian Appeals lacks jurisdiction to review decisions of the Assistant Secretary--Indian Affairs unless the matter is referred to it under 43 CFR 4.330(a)(2).

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay tribal attorney's fees is a decision based on the exercise of discretion.

Walker River Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 109  
(Jan. 17, 1990)



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether to approve an application for a grant under the Indian Business Development Program are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Honaghaahnii Marketing & Public Relations, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 144 (Feb. 14, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Yomba Tribal Council, Yomba Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 243 (Apr. 16, 1990)

La Jolla Band of Mission Indians v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 263 (Apr. 26, 1990)



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

McCoy Industries, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 234 (Apr. 11, 1990)

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 307 (May 31, 1990)

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Sonney Thornburg v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 239 (Apr. 13, 1990)



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Thomas Leslie Redleaf v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 268 (Apr. 30, 1990)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

Decisions of Bureau of Indian Affairs officials concerning whether to seek legislation affecting Indian allotments on the public domain are decisions based on the exercise of discretionary authority. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)

Decisions concerning whether a loan application under the Indian Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

to all legal prerequisites to the exercise of discretion.

Linda C. McDonald v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 399 (Aug. 21, 1990)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or any other party.

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

The Board of Indian Appeals has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to issue advisory opinions.

Grand Traverse Band of Ottawa & Chippewa Indians v. Acting Deputy to the Ass't Secretary--Indian Affairs (Tribal Services), 18 IBIA 450 (Sept. 24, 1990)

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure the proper consideration was given to all legal prerequisites to the exercise of discretion.

Johnnie Louis McAlpine v. Muskogee Area Director, Bureau of Indian Affairs, 19 IBIA 2 (Oct. 10, 1990)

Once an appeal is properly docketed by the Board of Indian Appeals in accordance with 43 CFR 4.336, the Board can be divested of jurisdiction only by the Secretary of the Interior or the Director of the Office of Hearings and Appeals, pursuant to 43 CFR 4.5, or by the Board's finding pursuant to 43 CFR 4.337(b) that an issue or issues raised in the appeal require the exercise of discretion committed to the Bureau of Indian Affairs.

The Board of Indian Appeals has held that it lacks authority to substitute its judgment for that of the Bureau of Indian Affairs when the Bureau has been granted discretion over the subject matter of an appeal; i.e., when there is "no law to apply." The



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Board has jurisdiction to determine whether a BIA decision is properly characterized as discretionary and whether all legal prerequisites to the exercise of discretion have been met.

In general, decisions concerning whether a request for a loan guaranty or grant under one of the business development programs operated by the Bureau of Indian Affairs are committed to the discretion of the Bureau. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the Bureau of Indian Affairs determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions are taken through the filing of an appropriate document with the Board.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)



BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

Decisions governing the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine aboriginal title to land.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Yavapai-Prescott Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 107 (Dec. 3, 1990)



#### BOARD OF LAND APPEALS

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

The Department of the Interior is part of the Executive branch of Government and is duty bound to carry out instructions of Congress enacted as law. The Board of Land Appeals has no authority to declare Acts of Congress invalid, unconstitutional, without authority, or otherwise improper. The Board is bound by the provisions of the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area" which have become law by virtue of congressional ratification.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the



BOARD OF LAND APPEALS--Continued

filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)



BOARD OF LAND APPEALS--Continued

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)



#### BOARD OF LAND APPEALS--Continued

The Board of Land Appeals generally applies the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); i.e., that estoppel is an extraordinary remedy, especially as it relates to public lands; and that estoppel against the Government must be based upon affirmative misconduct.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

A Federal oil and gas lease does not require notice and an opportunity to be heard prior to a decision to assess royalties based on a value of production which is higher than the price received by the lessee. The Department is not bound by the price reported by a lessee and has authority to determine for royalty purposes that the value of gas produced was different than the amount received by the lessee. A lessee is entitled to a reasoned and factual explanation supporting a decision setting a different value and an opportunity to challenge it and obtain review.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

#### BOUNDARIES

(See also Accretion, Avulsion, Public Lands, Reliction, Surveys of Public Lands)

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within



BOUNDARIES--Continued

sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177  
(Apr. 23, 1990) 97 I.D. 171

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

BUREAU OF INDIAN AFFAIRS  
(See also Indian Probate)

GENERALLY

Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

Beverly A. Smalley et al. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 459 (Sept. 27, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS

Generally

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

The Bureau of Indian Affairs is required to set forth the grounds upon which its decisions are based. Those grounds, which include, but are not limited to, the identification of relevant factual issues with an explanation of the legal significance of those facts, should normally appear in the decision below and be supported by the administrative record.

Alvin Atencio v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 126 (Jan. 31, 1990)

When the administrative record in an appeal from a Bureau of Indian Affairs decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

GMC Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

After issuing a decision subject to appeal under 25 CFR Part 2, a Bureau of Indian Affairs official may revoke that decision within the time for filing an appeal, provided no notice of appeal has been filed. Once a notice of appeal has been filed, the original deciding official loses jurisdiction over the matter, and jurisdiction is vested in the official who will decide the appeal.

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 444 (Sept. 21, 1990)

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

If, during the course of an appeal to the Board of Indian Appeals, the Bureau of Indian Affairs determines that the decision on appeal was incorrect, it can: (1) request that the decision be vacated and the matter remanded in order to grant the relief the appellant requests, (2) confess error and ask the Board to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions are taken through the filing of an appropriate document with the Board.

Bernadette L. Raymond v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 41 (Oct. 25, 1990)

A Bureau of Indian Affairs official is bound by a decision in an administrative appeal which has become final for the Department of the Interior.

Bryan Knows Ground et al. v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 50 (Nov. 6, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

An unorganized group lacks standing to bring an appeal under 25 CFR Part 2.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Under 25 CFR 2.7(a), it is the responsibility of a Bureau of Indian Affairs' deciding official to give notice of the decision to all interested parties known to the official.

Edward Parisian v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 109 (Dec. 3, 1990)

Acts of Agents of the United States

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Discretionary Decisions

Under 25 CFR 89.41, a decision whether to authorize the expenditure of appropriated funds to pay



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

tribal attorney's fees is a decision based on the exercise of discretion.

Walker River Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 109 (Jan. 17, 1990)

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary--Indian Affairs for the exercise of discretion committed to the Bureau of Indian Affairs and the issuance of a new decision.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

When a challenge is raised to a discretionary decision issued by a Bureau of Indian Affairs official under 25 CFR Chapter I, the appellant bears the burden of showing that the official did not properly exercise discretion.

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 307 (May 31, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Decisions of Bureau of Indian Affairs officials concerning whether to seek legislation affecting Indian allotments on the public domain are decisions based on the exercise of discretionary authority. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)

When the reason for denial of an application to modify a loan under the Indian Revolving Loan Program is not given in the denial decision, the decision will be vacated and the matter remanded for further proceedings.

Lyle Cochran v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 406 (Aug. 21, 1990)

The Board of Indian Appeals has held that it lacks authority to substitute its judgment for that of the Bureau of Indian Affairs when the Bureau has been granted discretion over the subject matter of an appeal; i.e., when there is "no law to apply." The Board has jurisdiction to determine whether a BIA decision is properly characterized as discretionary and whether all legal prerequisites to the exercise of discretion have been met.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Discretionary Decisions--Continued

Decisions governing the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

Where a Bureau of Indian Affairs Area Director denies an application for a loan under the Indian Revolving Loan Fund on the grounds that the financial condition of the applicant is inadequate to provide a reasonable prospect of repayment, the administrative record should show how the Area Director reached his conclusions concerning the applicant's financial condition.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 69 (Nov. 15, 1990)

Filing

Mandatory Time Limit

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

Matilda Arviso et al. v. Ass't Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 118 (Jan. 18, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Filing--Continued

Mandatory Time Limit--Continued

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

Under the circumstances of this case, the time for filing a notice of appeal was tolled during the time the Bureau of Indian Affairs Superintendent and the party adversely affected by the Superintendent's decision were engaged in discussions pursuant to a request to rescind the decision.

New Mexico Highway & Transportation Dept. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 165 (Feb. 23, 1990)

Regulations promulgated by the Bureau of Indian Affairs at 25 CFR 2.10 (1988) establish a 30-day period for filing a notice of appeal.

Badger Oil Corp. & Ute Indian Tribe of the Uintah & Ouray Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 174 (Mar. 1, 1990)

A notice of appeal from an action or decision of a Bureau of Indian Affairs official that is not timely filed with the Board of Indian Affairs will be dismissed for lack of jurisdiction in accordance with 43 CFR 4.332(a).

Louis Sequoyah Locust v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 286 (May 8, 1990)



BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Filing--Continued

Mandatory Time Limit--Continued

An appeal from a Bureau of Indian Affairs decision under 25 CFR Part 2 (1988) is timely if the notice of appeal is filed within 30 days after the appellant's receipt of the decision being appealed.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

BUREAU OF LAND MANAGEMENT

(See also Mineral Leasing Act)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the



BUREAU OF LAND MANAGEMENT--Continued

decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)



BUREAU OF LAND MANAGEMENT--Continued

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of a notice of appeal.

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions



BUREAU OF LAND MANAGEMENT--Continued

for failure to pay timely if BLM allows his request for deduction.

Patrick G. Blumm, dba Rio Grande Rapid Transit,  
116 IBLA 321 (Oct. 29, 1990)

CLASSIFICATION AND MULTIPLE USE ACT OF 1964

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)



COAL LEASES AND PERMITS.  
(See also Mineral Leasing Act)

GENERALLY

Where a pre-1976 coal lease is modified in 1981 and included in the modified lease is a term designating the lease as a logical mining unit, a subsequent rulemaking announcing that leases would no longer be automatically designated as logical mining units did not change the logical mining unit status of the modified lease.

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

DILIGENCE

Where a pre-1976 coal lease is modified in 1981 and included in the modified lease is a term designating the lease as a logical mining unit, a subsequent rulemaking announcing that leases would no longer be automatically designated as logical mining units did not change the logical mining unit status of the modified lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)



## COAL LEASES AND PERMITS--Continued

### READJUSTMENT

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal coal lease, and BLM's decision and the accompanying case record fail to disclose a rational basis for BLM's conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside and the case remanded for a new determination and inclusion of BLM's analysis in the record.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (Jan. 19, 1990)

Effective Feb. 26, 1990, 43 CFR 3473.3-2 requires payment of a royalty of 8 percent of the value of coal removed from an underground mine for all new leases issued under the Mineral Leasing Act of 1920 and for all previously issued leases at the time of the next scheduled readjustment of the lease.

Utah Power & Light Co., 115 IBLA 366 (Aug. 15, 1990)

### ROYALTIES

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal coal lease, and BLM's decision and the accompanying case record fail to disclose a rational basis for BLM's conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside and the



COAL LEASES AND PERMITS--Continued

ROYALTIES--Continued

case remanded for a new determination and inclusion of BLM's analysis in the record.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365  
(Jan. 19, 1990)

Effective Feb. 26, 1990, 43 CFR 3473.3-2 requires payment of a royalty of 8 percent of the value of coal removed from an underground mine for all new leases issued under the Mineral Leasing Act of 1920 and for all previously issued leases at the time of the next scheduled readjustment of the lease.

Utah Power & Light Co., 115 IBLA 366 (Aug. 15, 1990)

The Minerals Management Service has been delegated the royalty management functions of the Secretary including the authority to audit a lessee's records to determine royalty liability.

The authority of the Minerals Management Service to conduct an audit of a coal lessee's records to determine royalty liability is properly distinguished from the authority of the Minerals Management Service under 30 CFR 217.200 to require a lessee to retain an independent certified public accountant to conduct a self-audit.

A royalty valuation decision will be affirmed on appeal where the record establishes a reasonable basis for the valuation using one or more of the factors enumerated in the regulation. The fact that another regulatory factor was not used as a basis for valuation will not justify a remand of the case in the absence of a showing that the failure to use that factor was arbitrary and capricious.

Lone Star Steel Co., 117 IBLA 96 (Dec. 3, 1990)



## COLOR OR CLAIM OF TITLE

### GENERALLY

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

In order to satisfy the statutory requirement of possession of the land under claim or color of title, an applicant must establish a chain of title based on a document which, on its face, purports to convey title to the claimed land.

An essential element of a color-of-title claim is the good faith requirement. Good faith under the Color of Title Act mandates that an applicant and his predecessors honestly believe that they were vested with title. In order to determine whether a claimant or his predecessor honestly believed that he was seized with title, the Department may consider whether such belief was unreasonable in light of the facts then actually known. Knowledge of Federal ownership of the land negates the requisite good faith. To establish the requisite over 20 years of possession, an applicant may tack onto his possession a period when the land was possessed by his predecessors in title, but if this is done, their good faith must also be established. If, however, a predecessor in title did not hold in good faith, the chain is broken, the holding period of the predecessor in title cannot be tacked on, and the statutory period begins anew after the predecessor divested himself of title.

In order to qualify for a patent under the Color of Title Act, an applicant must have placed valuable improvements on the land or reduced the land to cultivation. In order to qualify as valuable improvements under the Act, they must have existed on the land at



COLOR OR CLAIM OF TITLE--Continued

GENERALLY--Continued

the time the application was filed and must enhance the value of the land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

An applicant for a class I claim under the Color of Title Act has the burden of establishing to the Secretary of the Interior's satisfaction that each of the statutory requirements for purchase under the Act have been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

Occupancy and improvement of public lands without color of title create no vested rights as against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act. In order to satisfy the statutory requirement of possession of the land under claim of color of title, an applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land.

Delfino J. & Clara M. Borrego, 113 IBLA 209 (Feb. 22, 1990)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors, or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based on a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

James A. Kesel, 113 IBLA 380 (Mar. 28, 1990)



## COLOR OR CLAIM OF TITLE--Continued

### APPLICATIONS

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met. The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

In order to satisfy the statutory requirement of possession of the land under claim or color of title, an applicant must establish a chain of title based on a document which, on its face, purports to convey title to the claimed land.

An essential element of a color-of-title claim is the good faith requirement. Good faith under the Color of Title Act mandates that an applicant and his predecessors honestly believe that they were vested with title. In order to determine whether a claimant or his predecessor honestly believed that he was seized with title, the Department may consider whether such belief was unreasonable in light of the facts then actually known. Knowledge of Federal ownership of the land negates the requisite good faith. To establish the requisite over 20 years of possession, an applicant may tack onto his possession a period when the land was possessed by his predecessors in title, but if this is done, their good faith must also be established. If, however, a predecessor in title did not hold in good faith, the chain is broken, the holding period of the predecessor in title cannot be tacked on, and the statutory period begins anew after the predecessor divested himself of title.

In order to qualify for a patent under the Color of Title Act, an applicant must have placed valuable improvements on the land or reduced the land to cultivation. In order to qualify as valuable improvements under the Act, they must have existed on the land at



COLOR OR CLAIM OF TITLE--Continued

APPLICATIONS--Continued

the time the application was filed and must enhance the value of the land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

An applicant for a class I claim under the Color of Title Act has the burden of establishing to the Secretary of the Interior's satisfaction that each of the statutory requirements for purchase under the Act have been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application.

Occupancy and improvement of public lands without color of title create no vested rights as against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act. In order to satisfy the statutory requirement of possession of the land under claim of color of title, an applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land.

Delfino J. & Clara M. Borrego, 113 IBLA 209 (Feb. 22, 1990)

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James A. Kesel, 113 IBLA 380 (Mar. 28, 1990)



## COLOR OR CLAIM OF TITLE--Continued

### DESCRIPTION OF LAND

In order to satisfy the statutory requirement of possession of the land under claim or color of title, an applicant must establish a chain of title based on a document which, on its face, purports to convey title to the claimed land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

Occupancy and improvement of public lands without color of title create no vested rights as against the United States, because no adverse possession of Government property can affect the title of the United States, except as provided by the Color of Title Act. In order to satisfy the statutory requirement of possession of the land under claim of color of title, an applicant's claim of apparent ownership must be based on a document which, on its face, purports to convey title to the claimed land.

Delfino J. & Clara M. Borrego, 113 IBLA 209 (Feb. 22, 1990)

### GOOD FAITH

An essential element of a color-of-title claim is the good faith requirement. Good faith under the Color of Title Act mandates that an applicant and his predecessors honestly believe that they were vested with title. In order to determine whether a claimant or his predecessor honestly believed that he was seized with title, the Department may consider whether such belief was unreasonable in light of the facts then actually known. Knowledge of Federal ownership of the land negates the requisite good faith. To establish the requisite over 20 years of possession, an applicant may tack onto his possession a period when the land was possessed by his predecessors in title, but if this is done, their good faith must also be established. If, however, a predecessor in title did not hold in good



#### COLOR OR CLAIM OF TITLE--Continued

##### GOOD FAITH--Continued

faith, the chain is broken, the holding period of the predecessor in title cannot be tacked on, and the statutory period begins anew after the predecessor divested himself of title.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

##### IMPROVEMENTS

In order to qualify for a patent under the Color of Title Act, an applicant must have placed valuable improvements on the land or reduced the land to cultivation. In order to qualify as valuable improvements under the Act, they must have existed on the land at the time the application was filed and must enhance the value of the land.

John P. & Helen S. Montoya, 113 IBLA 8 (Jan. 25, 1990)

#### COMMUNICATION SITES

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows



COMMUNICATION SITES--Continued

insufficient analysis of the leases considered in the appraisal.

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)



COMMUNICATION SITES--Continued

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Southern Pacific Transportation Co., 115 IBLA 239 (July 18, 1990)



COMMUNICATION SITES--Continued

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Southern Pacific Transportation Co., 116 IBLA 164  
(Sept. 26, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)



## CONSTITUTIONAL LAW

### GENERALLY

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Thomas Leslie Redleaf v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 268 (Apr. 30, 1990)

The Interior Board of Land Appeals is not the proper forum to decide constitutional issues.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

### DUE PROCESS

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

97 I.D. 215



## CONSTITUTIONAL LAW--Continued

### DUE PROCESS--Continued

A Federal oil and gas lease does not require notice and an opportunity to be heard prior to a decision to assess royalties based on a value of production which is higher than the price received by the lessee. The Department is not bound by the price reported by a lessee and has authority to determine for royalty purposes that the value of gas produced was different than the amount received by the lessee. A lessee is entitled to a reasoned and factual explanation supporting a decision setting a different value and an opportunity to challenge it and obtain review.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

## CONTESTS AND PROTESTS

(See also Administrative Procedure, Rules of Practice)

### GENERALLY

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

A contest complaint is required to contain a statement in clear and concise language of the facts constituting the grounds of the contest. A party seeking a hearing as to the mineral character of land which has been subject to a prior Departmental hearing must make a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the



## CONTESTS AND PROTESTS--Continued

### GENERALLY--Continued

effect of the previous judgment as to the character of the land.

An affidavit by a contest complainant is not a substitute for an affidavit of a witness corroborating the factual allegations of the complaint as required by 43 CFR 4.450-4(c). In the absence of an affidavit of a corroborating witness, a private contest complaint is properly dismissed.

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an "adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to



CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a protest filed more than 180 days after the enactment of ANILCA must be dismissed and such a protest does not relate back to objections made prior to ANILCA, which were considered by the Bureau of Land Management.

Thelma M. Eckert, 115 IBLA 43 (June 12, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)



## CONTESTS AND PROTESTS--Continued

### GOVERNMENT CONTESTS

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)



## CONTESTS AND PROTESTS--Continued

### GOVERNMENT CONTESTS--Continued

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

State of Alaska, 117 IBLA 148 (Dec. 13, 1990)

## CONTRACT DISPUTES ACT OF 1978

### ATTORNEY FEES

#### Allowable Expenses

Attorney fees incurred for review of the contracting officer's final decision before filing appellants' notice of appeal were not "routine claims processing," as alleged by the Government, but were reasonable and related to the adversary adjudication.

In an EAJA application, certain attorney billings were found to be excessive, redundant, and otherwise unnecessary, and thus unallowable under 5 U.S.C. § 504. In such circumstances, the Board was justified in employing the jury verdict approach to determine the amount of allowable attorney fees.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)



#### CONTRACTS

(See also Appeals, Claims Against the United States,  
Delegation of Authority, Labor, Rules of Practice)

#### GENERALLY

Disagreement with the terms of a signed contract does not negate those terms.

Thomas J. Sweeney v. Acting Anadarko Area Director,  
Bureau of Indian Affairs, 19 IBIA 101 (Nov. 29, 1990)

#### CONSTRUCTION AND OPERATION

##### Actions of Parties

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193



## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Actions of Parties--Continued

A contractor was found not to be entitled to an equitable adjustment for an inspector's refusal to conduct a backfill compaction test as requested by the contractor. The evidence indicated (1) that an earlier test taken by the inspector showed that backfill placed by the contractor did not meet specification requirements, (2) that any additional testing would not provide a true and accurate reading, and (3) that the contract documents provided that in any event, such testing was for the sole benefit of the Government.

Where a contractor was allowed to construct a "blockout" in the wall of a concrete structure pending arrival of pipe at the site, but that the design of such blockout was altered by the contracting officer before approval, the resulting deficiencies in the concrete could not be charged against the Government where the evidence showed that (1) it was the contractor's option whether to place the blockout or await for arrival of pipe at the site, (2) that in accommodating the contractor in its request to construct the blockout the Government saved the contractor time, money, and effort on the project, and (3) that the contractor could have shutdown the project in lieu of constructing the blockout, and that such shutdown would not have been the fault of the Government.

#### Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

The contemporaneous conduct of the parties during performance, before the contract becomes the subject of controversy, is accorded great, if not controlling, weight in determining responsibilities under the contract. Here, the contents of the Government's inspection reports were found to contain highly persuasive



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

evidence of the reasonableness of the contractor's position.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)

Allowable Costs

The Board refused to adopt a contractor's total cost method for pricing its equitable adjustment where the cost data and other evidence of record demonstrated that the Government was not responsible for many of the excess costs incurred by the contractor and included in its claim for relief.

A contractor's claim for an equitable adjustment for excess costs incurred as the result of the Government's rejection of a load of excessively wet concrete, was denied where the contractor failed to show by a preponderance of evidence that actions taken by the Government in batching the concrete were responsible for the rejected load.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

Changes and Extras

Where a contractor was required to perform more or different work, or to higher standards, than called for in the terms of the contract, it was entitled to an



## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Changes and Extras--Continued

equitable adjustment as a constructive change to the contract.

Appeal of White Buffalo Construction, IBCA-2166, 2173  
(Nov. 26, 1990)

#### Conflicting Clauses

Where provisions relating to form stripping and backfill times under a contract requiring construction of concrete structures along a conveyance channel were deemed to be ambiguous, but such ambiguity was not considered to be patently obvious, a contractor performing the concrete work under the contract was found to be entitled to an equitable adjustment under the principle of contra proferentem, where the contractor's interpretation of the provisions was within the zone of reason according to industry standard and custom.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

#### Construction Against Drafter

Where provisions relating to form stripping and backfill times under a contract requiring construction of concrete structures along a conveyance channel were deemed to be ambiguous, but such ambiguity was not considered to be patently obvious, a contractor performing the concrete work under the contract was found to be entitled to an equitable adjustment under the principle



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Construction Against Drafter--Continued

of contra proferentem, where the contractor's interpretation of the provisions was within the zone of reason according to industry standard and custom.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

In a Request for Proposals, the Government is required to give prospective bidders accurate and complete information concerning the work to be performed. If it fails to do so, or makes any changes after the contract has been let, and the contractor thereby incurs additional costs, the Government is liable for such costs.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

Contract Clauses

A contractor was found not to be entitled to an equitable adjustment for an inspector's refusal to conduct a backfill compaction test as requested by the contractor. The evidence indicated (1) that an earlier test taken by the inspector showed that backfill placed by the contractor did not meet specification requirements, (2) that any additional testing would not provide a true and accurate reading, and (3) that the contract documents provided that in any event, such testing was for the sole benefit of the Government.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract\_Clauses--Continued

A contractor's claim for an equitable adjustment for concrete work performed under a contract for construction of a pedestrian way was denied, where the discrepancy between the estimated quantities set forth in the contract documents and the quantities contained in the contractor's bid were so patent and glaring as to raise the duty to inquire, regardless of the reasonableness of the contractor's interpretation.

Appeal of Prism Construction Co., IBCA-2410 (Nov. 20, 1990)

Contracting Officer

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications

Under a contract for the construction of an urban road project, the Board found that the liability of the Government for the majority of the items of claim (failure to secure the timely removal of utility lines from the work areas, erroneous staking, improper testing standards, design problems) was established by a preponderance of the evidence, as was the failure of the Government to properly administer the contract in a number of respects. After noting that the evidence offered by the appellant in support of its total cost claim failed in a number of instances to establish a nexus between the cause of delay assigned and the amount of damages claimed and failed to separate delays for which the Government was responsible from delays attributable to actions of the contractor, the Board concluded (i) that the use of the total cost method for determining the amount of the equitable adjustment in such circumstances was not warranted; and (ii) that where the liability of the Government had been established but the amount of the equitable adjustment could not be determined with any degree of mathematical precision, it was proper to resort to the so-called jury verdict approach for the purpose of determining the amount of the equitable adjustment to which the appellant was entitled.

Appeals of Harvey C. Jones, Inc., IBCA-2070 et al.  
(Feb. 28, 1990) 97 I.D. 79

Where a contractor's estimate of screw fasteners required to comply with specified spacing is found to be correct and additional screws are required to make a Government-approved plywood underlayment for roofing membranes to lay flat, the added fasteners are found to be an additional contract requirement for which the contractor is compensated.

Appeal of Niko Contracting Co., IBCA-2368 (Mar. 30,  
1990) 97 I.D. 120



## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Drawings\_and\_Specifications--Continued

In a Request for Proposals, the Government is required to give prospective bidders accurate and complete information concerning the work to be performed. If it fails to do so, or makes any changes after the contract has been let, and the contractor thereby incurs additional costs, the Government is liable for such costs.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

#### Duty\_to\_Inquire

A contractor's claim for an equitable adjustment for concrete work performed under a contract for construction of a pedestrian way was denied, where the discrepancy between the estimated quantities set forth in the contract documents and the quantities contained in the contractor's bid were so patent and glaring as to raise the duty to inquire, regardless of the reasonableness of the contractor's interpretation.

Appeal of Prism Construction Co., IBCA-2410 (Nov. 20, 1990)

#### General\_Rules\_of\_Construction

Where provisions relating to form stripping and backfill times under a contract requiring construction of concrete structures along a conveyance channel were deemed to be ambiguous, but such ambiguity was not considered to be patently obvious, a contractor performing the concrete work under the contract was found to be entitled to an equitable adjustment under the principle



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

of contra proferentem, where the contractor's interpretation of the provisions was within the zone of reason according to industry standard and custom.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law.

The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the total minimum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

ASARCO Inc., 116 IBLA 120 (Sept. 21, 1990)



## CONTRACTS--Continued

### CONSTRUCTION AND OPERATION--Continued

#### Intent of Parties

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193

#### Modification of Contracts

##### Generally

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Modification of Contracts--Continued

Generally--Continued

appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193

Where a contractor was allowed to construct a "blockout" in the wall of a concrete structure pending arrival of pipe at the site, but that the design of such blockout was altered by the contracting officer before approval, the resulting deficiencies in the concrete could not be charged against the Government where the evidence showed that (1) it was the contractor's option whether to place the blockout or await for arrival of pipe at the site, (2) that in accommodating the contractor in its request to construct the blockout the Government saved the contractor time, money, and effort on the project, and (3) that the contractor could have shutdown the project in lieu of constructing the blockout, and that such shutdown would not have been the fault of the Government.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

Warranties

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Warranties--Continued

Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193

CONTRACT DISPUTES ACT OF 1978

Generally

Boards of Contract Appeals have jurisdiction to make awards pursuant to the Contract Disputes Act upon determining that private settlements entered into by the parties appear reasonable and that their ratification by the Board having jurisdiction over the appeal is in the best interests of the Government.

Appeals of Monterey Contruction Co., IBCA-2627-2634  
(July 17, 1990) 97 I.D. 225

The Board has jurisdiction pursuant to the Contract Disputes Act to examine a settlement agreement between the parties and, if there is sufficient evidence of record to sustain a finding that the settlement agreement is reasonable, to enter a judgment



CONTRACTS--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Generally--Continued

approving the compromise settlement agreed to by the parties.

Appeal of Harrison Western Corp., IBCA-2262 (Nov. 26, 1990)

Attorney Fees

The position of the Government in denying a claim for excess costs incurred during construction of an aqueduct is not substantially justified where the Government has wrongfully rejected the contractor's hoist gate gear motors based on faulty tests and erroneous application of an industry practice which should have shown that the contractor's gear motors met the technical requirements of the contract.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

Jurisdiction

Boards of Contract Appeals have jurisdiction to make awards pursuant to the Contract Disputes Act upon determining that private settlements entered into by the parties appear reasonable and that their ratification by the Board having jurisdiction over the appeal is in the best interests of the Government.

Appeals of Monterey Construction Co., IBCA-2627-2634  
(July 17, 1990) 97 I.D. 225



## CONTRACTS--Continued

### CONTRACT DISPUTES ACT OF 1978--Continued

#### Jurisdiction--Continued

The Board has jurisdiction pursuant to the Contract Disputes Act to examine a settlement agreement between the parties and, if there is sufficient evidence of record to sustain a finding that the settlement agreement is reasonable, to enter a judgment approving the compromise settlement agreed to by the parties.

Appeal of Harrison Western Corp., IBCA-2262 (Nov. 26, 1990)

## DISPUTES AND REMEDIES

### Appeals

Except in the case where the petitioning party contends that it has discovered new evidence that could not have been discovered earlier, the Board will generally deny a petition for reconsideration if it is not based on an asserted error of law.

Appeals of Harvey C. Jones, Inc. (On Reconsideration), IBCA-2070 et al. (Sept. 10, 1990)

### Burden of Proof

A contractor's claim for an equitable adjustment for excess costs incurred as the result of the Government's rejection of a load of excessively wet concrete, was denied where the contractor failed to show by a preponderance of evidence that actions taken by the



CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Government in batching the concrete were responsible for the rejected load.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

Damages

Liquidated Damages

Liquidated damages imposed by the Government upon a contractor under threat of a default termination, as a work incentive or penalty during the course of the contract, in a situation where the Government's solicitation did not adequately or precisely describe the work to be required, not only was a unilateral action by the Government which the contractor accepted only under duress, but was otherwise unwarranted, since the Government was primarily at fault in causing the delays that the contractor experienced.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

Measurement

The Board refused to adopt a contractor's total cost method for pricing its equitable adjustment where the cost data and other evidence of record demonstrated that the Government was not responsible for many of the excess costs incurred by the contractor and included in its claim for relief.

Where the Board determines that a contractor incurred additional costs as a result of the Government's constructive change, but such costs cannot be



CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Measurement--Continued

established with mathematical precision, it is proper for the Board to resort to a "jury verdict" in order to determine the amount of the contractor's equitable adjustment.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

When the Board is not persuaded that all of the unanticipated costs incurred by a services contractor are the result of extra work attributable to the Government's inadequate or defective specifications, it may determine by jury verdict the amount of additional compensation to which the contractor is entitled.

Appeal of The Wackenhut Corp., IBCA-2311 (Sept. 4, 1990)

During a weather-related suspension of a road construction contract, the Government was found to have suspended activities for an unreasonable period of time before authorizing recommencement of the work thereby entitling the contractor to an equitable adjustment.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)



CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments

Under a contract for the construction of an urban road project, the Board found that the liability of the Government for the majority of the items of claim (failure to secure the timely removal of utility lines from the work areas, erroneous staking, improper testing standards, design problems) was established by a preponderance of the evidence, as was the failure of the Government to properly administer the contract in a number of respects. After noting that the evidence offered by the appellant in support of its total cost claim failed in a number of instances to establish a nexus between the cause of delay assigned and the amount of damages claimed and failed to separate delays for which the Government was responsible from delays attributable to actions of the contractor, the Board concluded (i) that the use of the total cost method for determining the amount of the equitable adjustment in such circumstances was not warranted; and (ii) that where the liability of the Government had been established but the amount of the equitable adjustment could not be determined with any degree of mathematical precision, it was proper to resort to the so-called jury verdict approach for the purpose of determining the amount of the equitable adjustment to which the appellant was entitled.

Appeals of Harvey C. Jones, Inc., IBCA-2070 et al.  
(Feb. 28, 1990) 97 I.D. 79

Where a contractor's estimate of screw fasteners required to comply with specified spacing is found to be correct and additional screws are required to make a Government-approved plywood underlayment for roofing membranes to lay flat, the added fasteners are found to be an additional contract requirement for which the contractor is compensated.

Appeal of Niko Contracting Co., IBCA-2368 (Mar. 30,  
1990) 97 I.D. 120



CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

The Board refused to adopt a contractor's total cost method for pricing its equitable adjustment where the cost data and other evidence of record demonstrated that the Government was not responsible for many of the excess costs incurred by the contractor and included in its claim for relief.

Where the Board determines that a contractor incurred additional costs as a result of the Government's constructive change, but such costs cannot be established with mathematical precision, it is proper for the Board to resort to a "jury verdict" in order to determine the amount of the contractor's equitable adjustment.

A contractor was found not to be entitled to an equitable adjustment for an inspector's refusal to conduct a backfill compaction test as requested by the contractor. The evidence indicated (1) that an earlier test taken by the inspector showed that backfill placed by the contractor did not meet specification requirements, (2) that any additional testing would not provide a true and accurate reading, and (3) that the contract documents provided that in any event, such testing was for the sole benefit of the Government.

Where a contractor was allowed to construct a "blockout" in the wall of a concrete structure pending arrival of pipe at the site, but that the design of such blockout was altered by the contracting officer before approval, the resulting deficiencies in the concrete could not be charged against the Government where the evidence showed that (1) it was the contractor's option whether to place the blockout or await for arrival of pipe at the site, (2) that in accommodating the contractor in its request to construct the blockout the Government saved the contractor time, money, and effort on the project, and (3) that the contractor could have



CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

shutdown the project in lieu of constructing the block-out, and that such shutdown would not have been the fault of the Government.

A contractor's claim for an equitable adjustment for excess costs incurred as the result of the Government's rejection of a load of excessively wet concrete, was denied where the contractor failed to show by a preponderance of evidence that actions taken by the Government in batching the concrete were responsible for the rejected load.

Appeal of Andersen Construction Co. & Krow Construction, Inc., IBCA-2346 et al. (July 13, 1990)

The contemporaneous conduct of the parties during performance, before the contract becomes the subject of controversy, is accorded great, if not controlling, weight in determining responsibilities under the contract. Here, the contents of the Government's inspection reports were found to contain highly persuasive evidence of the reasonableness of the contractor's position.

Where a contractor was required to perform more or different work, or to higher standards, than called for in the terms of the contract, it was entitled to an equitable adjustment as a constructive change to the contract.

During a weather-related suspension of a road construction contract, the Government was found to have suspended activities for an unreasonable period of time before authorizing recommencement of the work thereby entitling the contractor to an equitable adjustment.

Appeal of White Buffalo Construction, IBCA-2166, 2173 (Nov. 26, 1990)



## CONTRACTS--Continued

### FORMATION AND VALIDITY

#### Mistakes

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193



CONTRACTS--Continued

INDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACT

Generally

A formula for the distribution of Indian Self-Determination Act contract funds among several Indian tribes must be made available for comment and discussion by the tribes prior to negotiation of the contracts for the fiscal year to which the formula applies.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

Regulations

In accordance with 25 CFR 271.4(h), a tribal contractor under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.), must apply the eligibility criteria for the contracted program which are established in the Bureau of Indian Affairs' regulations governing the program.

Under the Bureau of Indian Affairs' social services program regulations, the eligibility criteria for miscellaneous assistance in 25 CFR 20.23 do not incorporate the eligibility criteria for general assistance in 25 CFR 20.21.

Muscogee (Creek) Nation v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 135 (Feb. 1, 1990)



## CONVEYANCES

### EXCEPTIONS

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177  
(Apr. 23, 1990) 97 I.D. 171

## COURTS

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)



## DESERT LAND ENTRY

### GENERALLY

An irrigation plan that would transfer an existing water license from private farmland which has been subdivided for residential use in order to irrigate a desert land entry does not comply with provision of the Desert Land Entry Act requiring that an entryman provide a permanent and sufficient source of water to the desert entry.

When the Department reviews an irrigation plan pursuant to 43 U.S.C. § 327 (1982), it may consider whether a plan of irrigation is speculative and may reject a plan which is contrary to existing agricultural practices.

M. Kent Hafen, 114 IBLA 239 (May 7, 1990)

### APPLICATIONS

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

A decision to reject a desert land entry application because the lands identified in the entry cannot be farmed as an economically feasible operating unit will be set aside and the case remanded where there is no support in the record for the soil classification information utilized by BLM in its computer analysis which formed the basis for its decision, and where utilization of the soil classification information for



DESERT LAND ENTRY--Continued

APPLICATIONS--Continued

which there is record support dramatically favors the applicant's position.

Norma C. Jolley, 113 IBLA 292 (Mar. 12, 1990)

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

Nathan F. Gardiner, 114 IBLA 380 (May 24, 1990)

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

Where a desert land entry applicant receives notice from BLM that based on a computer projection the proposed operation has been determined to be economically unfeasible and the applicant fails to respond to an invitation to provide further support for the operation, BLM may properly reject the application. However, where the applicant alleges facts for the first time on appeal which should be considered by BLM in its analysis of the



## DESERT LAND ENTRY--Continued

### APPLICATIONS--Continued

plan, the Board may set aside BLM's decision and remand the case for consideration thereof.

Norma J. Brown, 116 IBLA 158 (Sept. 25, 1990)

### CULTIVATION AND RECLAMATION

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

Nathan F. Gardiner, 114 IBLA 380 (May 24, 1990)

### EXTENSION OF TIME

An application for an extension of time for the submission of final proof of a desert land entry is properly rejected where the entryperson is unable to show that failure to reclaim the land in the entry within the statutory life of the entry is due, without fault on his or her part, to unavoidable delay in the construction of intended irrigation works. Even though the entrypersons believed they were constrained from proceeding with development of their entries due to BLM's advice that their entries may be affected by an injunction in a pending lawsuit, their requests for extension of the statutory final proof period must be denied where they have not demonstrated that they did "all they could do." Where the entrypersons assert that they could not proceed with construction of the intended



DESERT LAND ENTRY--Continued

EXTENSION OF TIME--Continued

irrigation works because they could not obtain financing, they have not demonstrated they did all they could do when they failed to respond to BLM's request to submit information regarding the financial institutions who denied them financing.

Charlotte Peck et al., 116 IBLA 169 (Sept. 26, 1990)

An application for extension of time for submission of final proof of a desert land entry is properly rejected where there has been no showing that failure to reclaim the entry is due, without fault by the entryperson, to unavoidable delay in construction of irrigation works. An entryperson who has failed to make final proof within the 4-year period and has petitioned for an extension of time must, however, be allowed 90 days in which to submit final proof before her entry can be cancelled.

Carol Carlton, 117 IBLA 13 (Nov. 21, 1990)

LANDS SUBJECT TO

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)



## DESERT LAND ENTRY--Continued

### LANDS SUBJECT TO--Continued

BLM properly rejects a desert land entry application where, at the time the application was filed, the land sought had already been effectually reclaimed by conducting water to the land in sufficient quantity so as to render it available for irrigation of the land; where, at some time in the past, one-eighth of the land had been cultivated using that irrigation system; and where the entryman fails to establish that the land has reverted to an unreclaimed state by deterioration of that system.

Nathan F. Gardiner, 114 IBLA 380 (May 24, 1990)

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

### WATER SUPPLY

An irrigation plan that would transfer an existing water license from private farmland which has been subdivided for residential use in order to irrigate a desert land entry does not comply with provision of the Desert Land Entry Act requiring that an entryman provide a permanent and sufficient source of water to the desert entry.

When the Department reviews an irrigation plan pursuant to 43 U.S.C. § 327 (1982), it may consider whether a plan of irrigation is speculative and may



DESERT LAND ENTRY--Continued

WATER SUPPLY--Continued

reject a plan which is contrary to existing agricultural practices.

M. Kent Hafen, 114 IBLA 239 (May 7, 1990)

ENVIRONMENTAL POLICY ACT

(See also National Environmental Policy Act of 1969)

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere



ENVIRONMENTAL POLICY ACT--Continued

differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A finding of no significant impact will not be affirmed on appeal where the record suggests possible impacts on the environment, but the environmental assessment contains no discussion of environmental impacts of either the proposed action or the alternatives.

Rex Kipp, Jr., Justin Kipp, 115 IBLA 1 (May 30, 1990)

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD normally triggers the requirement for an environmental impact statement, unless an environmental impact statement has already been prepared which analyzes the impacts that can be expected from full-field development.

Michael Gold (On Reconsideration), 115 IBLA 218  
(July 12, 1990)



ENVIRONMENTAL POLICY ACT--Continued

A FONSI will be affirmed if the record supports a conclusion that all relevant areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359 (Aug. 14, 1990)



ENVIRONMENTAL POLICY ACT--Continued

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Uintah Mountain Club et al., 116 IBLA 269 (Oct. 22, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)



#### ENVIRONMENTAL QUALITY

(See also Water Pollution Control)

#### ENVIRONMENTAL STATEMENTS

BLM may properly proceed with a proposed timber sale where the environmental assessment adequately considered all relevant matters of environmental concern, including the impact of clearcutting and road-building on moose and elk populations, the hydrologic and vegetative character of the sale area and water quality in local streams, and where the finding that the sale would not significantly affect the human environment was supported by the record and was reasonable.

G. Jon & Katherine M. Roush, 112 IBLA 293 (Jan 9, 1990)

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)



ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress,  
114 IBLA 366 (May 24, 1990)



ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A finding of no significant impact will not be affirmed on appeal where the record suggests possible impacts on the environment, but the environmental assessment contains no discussion of environmental impacts of either the proposed action or the alternatives.

Rex Kipp, Jr., Justin Kipp, 115 IBLA 1 (May 30, 1990)

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are significant. Where a finding of no significant impact is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required.

Idaho Natural Resources Legal Foundation, Inc., et al., 115 IBLA 88 (June 21, 1990)

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD normally triggers the requirement for an environmental impact statement, unless an environmental impact statement has already been prepared which analyzes the



ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

impacts that can be expected from full-field development.

Michael Gold (On Reconsideration), 115 IBLA 218  
(July 12, 1990)

A FONSI will be affirmed if the record supports a conclusion that all relevant areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to



ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359  
(Aug. 14, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Uintah Mountain Club et al., 116 IBLA 269 (Oct. 22, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will



ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

BLM's FONSI with respect to a proposed expansion of a mining operation will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.

Although an EA for a proposed expansion of a mining operation to build a new cyanide heap leaching pad may be "tiered" to an earlier EIS, the earlier document must contain adequate information to address the alternatives. Where the EIS does not address the full extent of cumulative impacts of retention of cyanide in abandoned heaps, and where BLM is actively reviewing this question prior to allowing leaching of ore to begin on the new pad, BLM's decision to allow the permit amendment will be modified to make clear that BLM must consider whether to prepare a supplemental EIS considering cumulative impacts before allowing leaching operations to begin.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263



## ENVIRONMENTAL QUALITY--Continued

### HERBICIDES

An appeal from a BLM decision approving the use of herbicides as a means to control undesirable vegetation on public lands (based on a programmatic environmental impact statement) is properly dismissed where BLM has reserved the decision of whether and where to authorize actual herbicide spraying until after preparation of site-specific environmental assessments or environmental impact statements.

Salmon River Concerned Citizens et al., Lois Hollingsworth, 114 IBLA 344 (May 22, 1990)

## EQUAL ACCESS TO JUSTICE ACT

### GENERALLY

Attorney fees incurred for review of the contracting officer's final decision before filing appellants' notice of appeal were not "routine claims processing," as alleged by the Government, but were reasonable and related to the adversary adjudication.

Under the EAJA, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified, is entitled to attorney fees and other expenses based upon a constructive attorney charge of \$75 per hour. The Department of the Interior has not issued regulations determining that any special factors justify higher fees, and the Board is without authority to decide otherwise.

In an EAJA application, expenses for law clerk and paralegal time are allowable only at actual salary cost, not at the rate billed by the firm.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)



EQUAL ACCESS TO JUSTICE ACT--Continued

ADVERSARY ADJUDICATION

Attorney fees incurred for review of the contracting officer's final decision before filing appellants' notice of appeal were not "routine claims processing," as alleged by the Government, but were reasonable and related to the adversary adjudication.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

Cancellation of overriding royalty interests in an oil and gas lease and the requirement to repay overriding royalties does not constitute an adversary adjudication under sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. IV 1986), thus entitling the prevailing party on appeal to recover attorney fees and expenses.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)



## EQUAL ACCESS TO JUSTICE ACT--Continued

### ADVERSARY ADJUDICATION--Continued

Two applications for attorney's fees and expenses filed with the Board under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1990), one for services rendered in connection with an appeal of a BLM decision which was dismissed by the Board as premature, and the other in connection with a BLM decision which was withdrawn by BLM, are both properly denied because no adversary adjudication has occurred and the Office of Hearing and Appeals has not conducted an adjudication.

Rife Oil Properties, Inc., 116 IBLA 18 (Aug. 24, 1990)

### AWARDS

Under the EAJA, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified, is entitled to attorney fees and other expenses based upon a constructive attorney charge of \$75 per hour. The Department of the Interior has not issued regulations determining that any special factors justify higher fees, and the Board is without authority to decide otherwise.

In an EAJA application, certain attorney billings were found to be excessive, redundant, and otherwise unnecessary, and thus unallowable under 5 U.S.C. § 504. In such circumstances, the Board was justified in employing the jury verdict approach to determine the amount of allowable attorney fees.

In an EAJA application, expenses for law clerk and paralegal time are allowable only at actual salary cost, not at the rate billed by the firm.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)



EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978

Substantially Justified

The position of the Government in denying a claim for excess costs incurred during construction of an aqueduct is not substantially justified where the Government has wrongfully rejected the contractor's hoist gate gear motors based on faulty tests and erroneous application of an industry practice which should have shown that the contractor's gear motors met the technical requirements of the contract.

Application for Attorney Fees of Gracon Corp., IBCA-2582-F (Feb. 22, 1990)

ESTOPPEL

An alleged misrepresentation by BLM of a requirement concerning the proper form of remittance for a bid deposit for a competitive oil and gas lease sale is not an appropriate basis for equitable estoppel where the party asserting estoppel could have become aware of the true requirements by reference to Departmental regulations and the notice of competitive lease sale. Furthermore, a claim of estoppel based on appellant's allegation that BLM advised it that a company check would be acceptable for a bid deposit, fails because appellant has not established that BLM made a crucial misstatement in an official decision or otherwise engaged in any "official misconduct."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)



ESTOPPEL--Continued

Where a prior final Departmental administrative decision has expressly declined to consider an issue, the doctrine of res judicata or its administrative counterpart, the doctrine of administrative finality, ordinarily will not bar an appellant from raising the issue in a subsequent appeal. Further, the Secretary, acting through the Board, is not estopped by the principles of finality of administrative adjudication from correcting or reversing an erroneous decision by his subordinates or predecessors in interest.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27, 1990)

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

One who deals with the Government is presumed to know the applicable laws and regulation, and the United States cannot be bound or estopped by an act of its officers or agents if to estop the Government would undermine the correct enforcement of a particular statute or regulation.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such



ESTOPPEL--Continued

verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change his position for the worse.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury. Additionally, the party seeking estoppel must show that the Government engaged in affirmative misconduct and that the allegedly estopping statements were made in writing by an official at a policymaking level.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

Application of the doctrine of equitable estoppel requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. A statement by a BLM employee that it was his personal opinion that farm tap gas was royalty free, with the express caveat that further advice would be sought from superiors and from counsel before the



ESTOPPEL--Continued

issue was resolved, cannot be the basis for a claim of estoppel.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

An alleged conflict between Departmental oil and gas regulations and a policy guideline used by MMS to govern royalty administration failed to establish a foundation for a claim of equitable estoppel where no factual or legal conflict was shown to exist between the regulations and the guideline so as to establish the claimed misrepresentation by Federal employees.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

The Board of Land Appeals generally applies the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); i.e., that estoppel is an extraordinary remedy, especially as it relates to public lands; and that estoppel against the Government must be based upon affirmative misconduct.

As a precondition for invoking the defense of estoppel, the erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official bulletin.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change its position for the worse.

Eastern Minerals Internat'l, Inc., 117 IBLA 221 (Dec. 21, 1990)



## EVIDENCE

### GENERALLY

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did



EVIDENCE--Continued

GENERALLY--Continued

cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor),  
113 IBLA 352 (Mar. 22, 1990)

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)



EVIDENCE--Continued

GENERALLY--Continued'

To show that parties were engaged in a joint venture there must be evidence of (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

BURDEN OF PROOF

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

An appellant before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)



## EVIDENCE--Continued

### BURDEN OF PROOF--Continued

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

### PREPONDERANCE

An appellant before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)



EVIDENCE--Continued

PRESUMPTIONS

There is a presumption that land granted to a state for school purposes was of the character contemplated by the grant, and that title to the land has consequently passed to the state. Where a mining claimant contends that land within a state school grant was mineral in character when surveyed, and was therefore excluded from the grant, the mining claimant bears the burden of proving the land was mineral in character.

George McDevitt, 113 IBLA 287 (Mar. 12, 1990)

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)



## EVIDENCE--Continued

### PRIMA FACIE CASE

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

### SUFFICIENCY

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was



EVIDENCE--Continued

SUFFICIENCY--Continued

intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

A Private Maintenance and Care Agreement for a wild horse is properly cancelled and the horse is properly repossessed by the Federal Government where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement by "inhumanely treating" the horse, in that it was allowed to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community.

Where the record establishes that a wild free-roaming horse that has been placed for adoption was found in a deteriorated condition, the burden of proving that the horse was in satisfactory condition rests with the adopter. This burden is not met by uncorroborated assertions and statements of neighbors as to the general well-being of the horse.

Thana Conk, 114 IBLA 263 (May 9, 1990)

BLM may properly cancel a Private Maintenance and Care Agreement for an adopted wild horse when there is sufficient evidence of improper care of the horse to establish that the adopter violated the terms of the Agreement.

Kathleen Chapman, 115 IBLA 59 (June 12, 1990)



## EVIDENCE--Continued

### SUFFICIENCY--Continued

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

### WEIGHT

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best



EVIDENCE--Continued

WEIGHT--Continued

position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

EXCHANGES OF LAND

(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects)

GENERALLY

Protests against an exchange are properly denied where protestants do not establish that the proposed exchange would be contrary to provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), applicable regulations, operative land-use management plans, or that the exchange will contravene the public interest.

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazer is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs, 114 IBLA 393 (May 30, 1990)



FEDERAL EMPLOYEES AND OFFICERS

(See also Administrative Authority, Claims Against the United States, Officers & Employees)

GENERALLY

A rental rate adjustment determination, modified below as a result of errors in the record necessitating such corrective action, will be affirmed on appeal in the absence of evidence by appellant which would warrant any further adjustment in the rental.

In the Matter of the Quarters Rental Rate Appeal of Mr. Cliff Walker, 8 OHA 232 (Oct. 24, 1990)

AUTHORITY TO BIND GOVERNMENT

An alleged misrepresentation by BLM of a requirement concerning the proper form of remittance for a bid deposit for a competitive oil and gas lease sale is not an appropriate basis for equitable estoppel where the party asserting estoppel could have become aware of the true requirements by reference to Departmental regulations and the notice of competitive lease sale. Furthermore, a claim of estoppel based on appellant's allegation that BLM advised it that a company check would be acceptable for a bid deposit, fails because appellant has not established that BLM made a crucial misstatement in an official decision or otherwise engaged in any "official misconduct."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on



FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)



FEDERAL EMPLOYEES AND OFFICERS--Continued

AUTHORITY TO BIND GOVERNMENT--Continued

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

Application of the doctrine of equitable estoppel requires a demonstration of affirmative misrepresentation or affirmative concealment of a material fact by the Government. A statement by a BLM employee that it was his personal opinion that farm tap gas was royalty free, with the express caveat that further advice would be sought from superiors and from counsel before the issue was resolved, cannot be the basis for a claim of estoppel.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

An alleged conflict between Departmental oil and gas regulations and a policy guideline used by MMS to govern royalty administration failed to establish a foundation for a claim of equitable estoppel where no factual or legal conflict was shown to exist between the regulations and the guideline so as to establish the claimed misrepresentation by Federal employees.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976  
(See also Hearings, Rights-of-Way)

GENERALLY

Allowing the harvesting of timber on O&C lands does not violate the broad principle of multiple-use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production pursuant to the Act of Aug. 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

ASSESSMENT WORK

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)



## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

### ASSESSMENT WORK--Continued

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

### CALIFORNIA DESERT CONSERVATION AREA

The California Desert Conservation Area Plan created four multiple-use classes for planning purposes, requiring that subsequent planners use those classes by following guidelines established for each class.

Within an area of critical environmental concern designated by the California Desert Conservation Area Plan, Departmental planners may sanction land use without regard to multiple-use guidelines. Outside the area of critical environmental concern, planners must abide by established multiple-use guidelines.

A decision to close travel routes in an area designated "Multiple-Use Class L" by the California Desert Conservation Area Plan that failed to apply multiple-use guidelines in designating routes is set aside and remanded to permit application of the required class "L" guidelines.

Planning decisions made when the California Desert Conservation Area Plan was approved in 1980 are not



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CALIFORNIA DESERT CONSERVATION AREA--Continued

subject to review on appeal of the 1989 Afton Canyon Management Plan.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

When BLM rejects a plan of operations affecting lands in the California Desert Conservation Area because the proposed activity will result in unnecessary or undue degradation of the affected lands, and will result in the undue impairment of the scenic, scientific, and environmental values of those lands, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

Eric L. Price, James C. Thomas, 116 IBLA 210 (Oct. 4, 1990)

CORRECTION OF CONVEYANCE DOCUMENTS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CORRECTION OF CONVEYANCE DOCUMENTS--Continued

administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)

EXCHANGES

Protests against an exchange are properly denied where protestants do not establish that the proposed exchange would be contrary to provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), applicable regulations, operative land-use management plans, or that the exchange will contravene the public interest.

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazer is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs, 114 IBLA 393 (May 30, 1990)

LAND-USE PLANNING

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

supported by the record, absent a showing of clear reasons for modification or reversal.

Pursuant to 43 CFR 1610.5-3(a), all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM off-road vehicle designation which does not conform to the applicable, approved resource management plan shall be set aside.

Uintah Mountain Club, 112 IBLA 287 (Jan. 5, 1990)

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register. A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

In re Grassy Overlook Timber Sale, 115 IBLA 359  
(Aug. 14, 1990)

The California Desert Conservation Area Plan created four multiple-use classes for planning purposes, requiring that subsequent planners use those classes by following guidelines established for each class.

Within an area of critical environmental concern designated by the California Desert Conservation Area Plan, Departmental planners may sanction land use without regard to multiple-use guidelines. Outside the area of critical environmental concern, planners must abide by established multiple-use guidelines.

A decision to close travel routes in an area designated "Multiple-Use Class L" by the California Desert Conservation Area Plan that failed to apply multiple-use guidelines in designating routes is set aside and remanded to permit application of the required class "L" guidelines.

Planning decisions made when the California Desert Conservation Area Plan was approved in 1980 are not subject to review on appeal of the 1989 Afton Canyon Management Plan.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

A BLM decision implementing a resource management plan will be affirmed on appeal if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility between the applicable resource management plan and the application shall be affirmed.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

A BLM decision to gather wild free-roaming horses from within and outside a wild horse herd management area will be affirmed on appeal when: (1) a conclusion that the dormant season utilization levels have exceeded the utilization levels called for in an approved resource management plan is supported by field-monitoring data; (2) the actual size of the wild horse herd exceeds an appropriate management level identified in approved land-use plans; and (3) it is necessary to remove the "excess" horses to restore and



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

maintain a thriving natural ecological balance to the range and protect it from deterioration associated with overpopulation.

Animal Protection Institute of America, 117 IBLA 208  
(Dec. 21, 1990)

LEASES

An appraisal of fair market rental value for an agricultural lease site will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Phyllis E. Lewis, 113 IBLA 376 (Mar. 28, 1990)

In accordance with 43 U.S.C. § 1732(b) (1982), BLM may regulate the use, occupancy, and development of the public lands by issuing a lease to an individual occupying the land in excess of that authorized under a range improvement permit, rather than selling or exchanging such land, where the land-use plan for the area, pending reevaluation and revision, calls for the land to be retained in Federal ownership.

Steve Medlin, 115 IBLA 92 (June 21, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LEASES--Continued

An appraisal will be affirmed where no error was shown in the appraisal which used market data to establish annual fair market rental value for an irrigation pond right-of-way where it was not proved that the appraised rental was excessive.

James E. Payne & Evon Payne, 115 IBLA 294 (July 26, 1990)

PERMITS

An appraisal of fair market rental value will be affirmed unless an appellant either demonstrates error in the appraisal method or presents convincing evidence that the charges are excessive. Generally, it is proper to use the comparable lease appraisal method for determining fair market rental value of nonlinear land use. However, a comparable lease appraisal may be set aside and the case remanded if it appears from the record that the use of the lands designated as comparable significantly differs from the intended use of the subject site.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation and substantially followed.

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly reversed insofar as it purports to affect a period beyond the expiration date of the permits.

Patrick G. Blumm, dba Rio Grande Rapid Transit,  
116 IBLA 321 (Oct. 29, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS

An appellant bears the burden of showing error in a BLM decision denying approval of a mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

Robert L. Baldwin, Sr., & E. Rose Baldwin, 116 IBLA 84  
(Sept. 17, 1990)

When BLM rejects a plan of operations affecting lands in the California Desert Conservation Area because the proposed activity will result in unnecessary or undue degradation of the affected lands, and will result in the undue impairment of the scenic, scientific, and environmental values of those lands, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

Eric L. Price, James C. Thomas, 116 IBLA 210 (Oct. 4, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976, or if denial of exercise of valid existing rights will preclude the claimant's development of the claim.

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288  
(Oct. 23, 1990)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

When a single mining claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982), on two occasions and given two mining recordation serial numbers, the files should be merged and one of the serial numbers canceled. If between the two serial numbers all requisite filings have been made, the claim should not be deemed abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

Departmental regulation 43 CFR 3833.1-3(c) requires that annual filings made pursuant to 43 CFR 3833.2 regarding evidence of assessment work and/or notice of intention to hold be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site. This requirement became effective on Jan. 3, 1989, the first business day of that year, and applies to any filing made on or after that date. The fact that a mining claimant may have performed his assessment work and executed the documents prior to that date does not relieve him of the obligation to comply with this requirement.

Amada Mineral Corp., 116 IBLA 257 (Oct. 17, 1990)

RECORDATION OF MINING CLAIM CERTIFICATES OR  
NOTICES OF LOCATION

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIM CERTIFICATES OR  
NOTICES OF LOCATION--Continued

and notation of a forest exchange application, the mining claim is properly held to be null and void.

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the location of the claims, failing which the claims are properly declared abandoned and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Rights acquired under a relocation of a mining claim abandoned pursuant to 43 U.S.C. § 1744 (1982), will not relate back to the date of location of the original claim but only to the date of the relocation.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

When a mineral locator has filed a location certificate with BLM within 90 days of the date of the location of the claim as required by 43 U.S.C. § 1744(b) (1982), it is error for BLM to later reject the recordation of the claim. BLM's decision cannot change the fact the locator has complied with the statute. The fact the claim has been recorded with BLM, however, does not establish its validity.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIM CERTIFICATES OR  
NOTICES OF LOCATION--Continued

A mining claimant may correct the misidentification of a township on a map filed pursuant to the regulations implementing 43 U.S.C. § 1744 (1982).

The Carrow Co., 115 IBLA 102 (June 26, 1990)

Regulation 43 CFR 3833.1-3(b), which increased the service charge to \$10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a \$5 service charge per claim are properly rejected by BLM upon expiration of a 30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a \$5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

Herbert M. Cole et al., 115 IBLA 272 (July 26, 1990)

REPEALERS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393  
(Mar. 28, 1990)



## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

### REPEALERS--Continued

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

### RIGHTS-OF-WAY

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for sewage stabilization lagoons filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Pete Zanetti, 113 IBLA 239 (Feb. 28, 1990)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

Ben J. Trexel, 113 IBLA 250 (Mar. 8, 1990)

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows insufficient analysis of the leases considered in the appraisal.

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Southern Pacific Transportation Co., 115 IBLA 239 (July 18, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

C. B. Slabaugh, 116 IBLA 63 (Sept. 5, 1990)

Under FLPMA, the Secretary of the Interior has discretionary authority to grant rights-of-way. A BLM decision approving a trail right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved; made with due regard for the public interest; and no reason for disturbing the decision is shown.

A FONSI will be affirmed if the record supports a conclusion that all relevant areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SERVICE CHARGES

Regulation 43 CFR 3833.1-3(b), which increased the service charge to \$10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a \$5 service charge per claim are properly rejected by BLM upon expiration of a 30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a \$5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

Herbert M. Cole et al., 115 IBLA 272 (July 26, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)



## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

### SERVICE CHARGES--Continued

Departmental regulation 43 CFR 3833.1-3(c) requires that annual filings made pursuant to 43 CFR 3833.2 regarding evidence of assessment work and/or notice of intention to hold be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site. This requirement became effective on Jan. 3, 1989, the first business day of that year, and applies to any filing made on or after that date. The fact that a mining claimant may have performed his assessment work and executed the documents prior to that date does not relieve him of the obligation to comply with this requirement.

Amada Mineral Corp., 116 IBLA 257 (Oct. 17, 1990)

### SURFACE MANAGEMENT

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

B. K. Lowndes et al., 113 IBLA 321 (Mar. 14, 1990)

### WILDERNESS

BLM's decision to allow use of off-road vehicles in wilderness study areas will be affirmed where appellant has failed to show that such use will impair wilderness suitability or cause undue or unnecessary degradation.

Uintah Mountain Club, 112 IBLA 287 (Jan. 5, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

Construction of two guzzlers within a wilderness study area will be affirmed where the record establishes that the purpose of the guzzlers is to increase available water for wildlife and that the construction of the guzzlers will not impair the area's suitability for inclusion in the permanent wilderness system.

Oregon Natural Resources Council, 114 IBLA 163 (Apr. 19, 1990)

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976, or if denial of exercise of valid existing rights will preclude the claimant's development of the claim.

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288 (Oct. 23, 1990)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WITHDRAWALS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393  
(Mar. 28, 1990)

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register. A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105  
(Sept. 17, 1990)



## FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

### GENERALLY

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

### ASSESSMENTS

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ASSESSMENTS--Continued

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

Pursuant to sec. 111 of the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1721 (1982), MMS is authorized to assess a higher interest rate for late payment of oil and gas royalties than it had previously been authorized to assess; therefore, for time periods prior to passage of the Federal Oil and Gas Royalty Management Act of 1982, MMS may assess only the lower, previously authorized interest rate.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

MMS is required by law to assess interest charges on late royalty payments for oil and gas leasees which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ASSESSMENTS--Continued

earlier decision and affirm the MMS order assessing late payment charges.

Dugan Production Corp. (On Reconsideration), 117 IBLA 153 (Dec. 13, 1990)

CIVIL PENALTIES

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

Assessments for late reporting of royalty on production pursuant to the regulation at 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719 (1982), and are not subject to the procedures required by that section.

Phillips Petroleum Co., 116 IBLA 152 (Sept. 24, 1990)

ROYALTIES

A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified MMS of acceptance of this responsibility by filing a



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

payor information form may be held liable for royalties due under the terms of the lease.

A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting gas sold was not priced in accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the revised valuation and afforded an opportunity to respond as required by the lease terms.

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)

97 I.D. 11

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

The regulations found at 43 CFR 218.102(a) and 218.150(b) provide exceptions to the assessment of late payment charges when royalty payments are made after the end of the month following the month in which the oil and gas is produced and sold. The exception applies if the payor has filed a timely and sufficient estimated payment for the applicable lease account and each product type in accordance with the instructions in the MMS Oil & Gas Payor Handbook. MMS properly assesses late payment charges when a payor has not submitted an estimated payment for a specific lease or product type, even if the total of the estimated payments attributable to the payor exceeds the total royalties due for production from all of the payor's leases.

Exxon Co., U.S.A., 115 IBLA 62 (June 14, 1990)



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level and fails to provide estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 115 IBLA 81 (June 19, 1990)

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

Operating leases are a proper component of a transportation allowance for a CO2 pipeline which is required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

costs and no rational basis for such a limitation is given in the decision or contained in the record.

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the transportation allowance is calculated will be upheld as reasonable.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

Pursuant to sec. 111 of the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1721 (1982), MMS is authorized to assess a higher interest rate for late payment of oil and gas royalties than it had previously been authorized to assess; therefore, for time periods prior to passage of the Federal Oil and Gas Royalty Management Act of 1982, MMS may assess only the lower, previously authorized interest rate.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

The regulated ceiling price of gas under the Natural Gas Policy Act (NGPA) is a relevant factor in determining the value of the gas for royalty purposes. Where an assessment of additional royalty after audit is based on a failure of the producer to file a timely application for classification of the gas under sec. 102 of the NGPA (allowing a higher ceiling price), and where the record discloses an issue of material fact concerning whether the producer knew or should have known the gas would qualify for a higher ceiling price



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

at an earlier time, the case is properly referred for an evidentiary hearing.

Mobil Oil Corp., 115 IBLA 304 (Aug. 7, 1990)

Although royalty underpayments are improper by definition and may, under some circumstances, subject the payor to civil and/or criminal penalties, the issue in the context of a royalty audit is what, if any, additional royalty is due and owing to the lessor. Where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit regardless of the fact that the underpayments were intended to recoup the prior overpayments.

Forest Oil Corp. (On Reconsideration), 116 IBLA 176  
(Sept. 26, 1990) 97 I.D. 239

MMS is required by law to assess interest charges on late royalty payments for oil and gas leasees which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its earlier decision and affirm the MMS order assessing late payment charges.

Dugan Production Corp. (On Reconsideration), 117 IBLA 153 (Dec. 13, 1990)



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

GEOTHERMAL LEASES

(See also Hearings, Mineral Leasing Act)

GENERALLY

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not



## GEOHERMAL LEASES--Continued

### GENERALLY--Continued

result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

### DRILLING

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

### ENVIRONMENTAL PROTECTION

#### Water Quality and Other Environmental Qualities

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not



## GEOHERMAL LEASES--Continued

### ENVIRONMENTAL PROTECTION--Continued

#### Water Quality and Other Environmental Qualities--Continu

result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

## GEOHERMAL RESOURCES

A decision to approve an application for permit to drill a geothermal well will not be disturbed on appeal where it is shown that there is a connection between water wells alleged to be affected by such drilling and the geothermal resource. Where the record establishes that other factors unrelated to the geothermal drilling may be the cause of damage to the water wells, the Secretary is entitled to rely on his experts in the field who are of the opinion that the drilling will not result in contamination of groundwater supplies or otherwise harm the environment.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

## GRAZING AND GRAZING LANDS

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazier is entitled to prior notice of 2 years duration, and



#### GRAZING AND GRAZING LANDS--Continued

compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs,  
114 IBLA 393 (May 30, 1990)

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Forgey Ranch Co. v. Bureau of Land Management, 116 IBLA 32 (Aug. 27, 1990)

#### GRAZING LEASES

(See also Taylor Grazing Act)

##### GENERALLY

The holder of the expiring permit must accept the terms and conditions to be included in the new permit in order to receive first priority for receipt of the new permit. When a BLM notice seeking applications for a grazing permit sets out conditions for issuance of the permit which are within the scope of BLM's authority, the conditions are not arbitrary and capricious, and when it is clear that an applicant who may otherwise qualify for first priority has no desire to meet those terms and conditions, it is proper for BLM to reject the application because the applicant does not intend to meet the terms and conditions precedent to issuance of the permit.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)



#### GRAZING PERMITS AND LICENSES

(See also Appeals, Hearings, Taylor Grazing Act)

##### GENERALLY

The holder of the expiring permit must accept the terms and conditions to be included in the new permit in order to receive first priority for receipt of the new permit. When a BLM notice seeking applications for a grazing permit sets out conditions for issuance of the permit which are within the scope of BLM's authority, the conditions are not arbitrary and capricious, and when it is clear that an applicant who may otherwise qualify for first priority has no desire to meet those terms and conditions, it is proper for BLM to reject the application because the applicant does not intend to meet the terms and conditions precedent to issuance of the permit.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA 69 (June 15, 1990)

Pursuant to the regulations at 43 CFR Part 4100, if an applicant for a grazing preference owns land in a grazing district but that land does not serve as a base for livestock operations which utilize public lands, his application is properly denied.

If an applicant for a grazing preference does not timely file a completed application and moreover offers a preference right which had previously terminated, a decision denying the application will not be overturned on appeal.

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility



GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

between the applicable resource management plan and the application shall be affirmed.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

ADJUDICATION

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Forgey Ranch Co. v. Bureau of Land Management, 116 IBLA 32 (Aug. 27, 1990)

APPEALS

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Forgey Ranch Co. v. Bureau of Land Management, 116 IBLA 32 (Aug. 27, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed



## GRAZING PERMITS AND LICENSES--Continued

### APPEALS--Continued

decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Pursuant to the regulations at 43 CFR Part 4100, if an applicant for a grazing preference owns land in a grazing district but that land does not serve as a base for livestock operations which utilize public lands, his application is properly denied.

If an applicant for a grazing preference does not timely file a completed application and moreover offers a preference right which had previously terminated, a decision denying the application will not be overturned on appeal.

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Pursuant to 43 CFR 1610.5-3(a) all resource management authorizations and actions, as well as budget or other action proposals and subsequent more detailed or specific planning, shall conform to the approved resource management plan. A BLM decision to deny a grazing permit application based on incompatibility between the applicable resource management plan and the application shall be affirmed.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)



## GRAZING PERMITS AND LICENSES--Continued

### CANCELLATION OR REDUCTION

Where a Federal land exchange results in the diminution of a grazing allotment, provisions of 43 CFR 4110.4-2 require that affected permits be modified to reflect the changed area of use. When such a diminution of a permit takes place, the grazer is entitled to prior notice of 2 years duration, and compensation for any improvements authorized to be placed on the land.

John S. Peck, Owen K. Speirs, Claire T. Speirs,  
114 IBLA 393 (May 30, 1990)

### HEARINGS

(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control)

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109



HEARINGS--Continued

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317 (May 14, 1990)

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373 (May 24, 1990)



#### HEARINGS--Continued

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

#### INDIAN PROBATE

(See also Appeals, Bureau of Indian Affairs, Hearings, Indians, Rules of Practice)

APPEAL (See also PLEADING, RECONSIDERATION)

#### Generally

The burden of proving error in an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of Donald Paul Lafferty, 19 IBIA 90 (Nov 27, 1990)



INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION)--Continued

Generally--Continued

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Warren Lewis Lincoln, 19 IBIA 118 (Dec. 20, 1990)

Matters Considered on Appeal

The Board of Indian Appeals is not required to consider evidence raised for the first time on appeal.

Estate of Warren Lewis Lincoln, 19 IBIA 118 (Dec. 20, 1990)

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING)

Generally

Rehearings in Indian probate proceedings are intended to allow consideration of alleged errors made by the Administrative Law Judge and to permit the introduction of evidence that could not, with diligent effort, have been discovered prior to the original hearing. They are not a means for presenting evidence and arguments that were known at the time of the original hearing but not introduced.

Estate of Howard Little Charley, 18 IBIA 335 (July 3, 1990)



## INDIAN PROBATE--Continued

### STATE LAW

#### Applicability to Indian Probate, Testate

The execution and construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee,  
18 IBIA 153 (Feb. 15, 1990)

### WILLS (See also CONTRACT TO MAKE WILL, INHERITING)

#### Applicability of State Law

The execution and construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee,  
18 IBIA 153 (Feb. 15, 1990)

#### Children, Disinheritance of

Under Tooahnippah v. Hickel, 397 U.S. 598 (1970), in the absence of substantive probate regulations, the Department of the Interior lacks the authority to disapprove an Indian will because it does not provide for pretermitted heirs.

Estate of Howard Little Charley, 18 IBIA 335 (July 3, 1990)



## INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)  
--Continued

### Construction of

The Secretary of the Interior, as trustee under a testamentary trust including an Osage headright interest, is bound to carry out the testamentary restrictions imposed by the testator.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

### Disapproval of Will

Under Tooahnippah v. Hickel, 397 U.S. 598 (1970), in the absence of substantive probate regulations, the Department of the Interior lacks the authority to disapprove an Indian will because it does not provide for pretermitted heirs.

Estate of Howard Little Charley, 18 IBIA 335 (July 3, 1990)

### Testamentary Capacity

#### Generally

To invalidate an Indian will for lack of testamentary capacity, it must be shown that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Furthermore, it must be shown that this condition existed at the time the will was executed.

Estate of Pearl Big Bow Aungkotoye Nahno Kerchee, 18 IBIA 153 (Feb. 15, 1990)



INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)  
--Continued

Testamentary Capacity--Continued

Generally--Continued

An Indian testator may be deemed competent to make a will even though he is unable to manage his own business affairs, has had a guardian appointed for him, is illiterate, and/or is unable to speak or understand the English language.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Estate of Joseph Poolaw, 18 IBIA 358 (July 9, 1990)

Undue Influence

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to the decedent's own desires.

Estate of Joseph Poolaw, 18 IBIA 358 (July 9, 1990)



INDIAN PROBATE--Continued

WITNESSES

Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Donald Paul Lafferty, 19 IBIA 90 (Nov 27, 1990)

INDIANS

(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate)

GENERALLY

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Little Shell Tribe of Chippewa Indians of Montana v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 282 (May 8, 1990)

In order to estop the Government, the party seeking estoppel must show, at least, that the traditional elements of estoppel are present. Thus, the party seeking estoppel must show that: (1) the party to be estopped knew the facts; (2) he intended that his conduct should be acted on or so acted that the party asserting the estoppel had a right to believe it was so intended; (3) the latter was ignorant of the true facts; and (4) he relied on the former's conduct to his injury. Additionally, the party seeking estoppel must



INDIANS--Continued

GENERALLY--Continued

show that the Government engaged in affirmative misconduct and that the allegedly estopping statements were made in writing by an official at a policymaking level.

The Federal Government is not bound by a State court decision to which the Federal Government was not a party.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

Sec. 2 of the AIRFA does not prohibit BLM from adopting a land use that conflicts with traditional Indian religious beliefs or practices. BLM complies with AIRFA if, in the decisionmaking process, it obtains and considers the views of the Indians, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263

The Board of Indian Appeals is not required to



## INDIANS--Continued

### GENERALLY--Continued

consider issues and arguments that are raised for the first time on appeal.

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

## ATTORNEYS

### Contracts

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)

The Board of Indian Appeals has jurisdiction to review a decision of a Bureau of Indian Affairs official declining to approve or disapprove an Indian group's attorney contract on the basis that the group is not a Federally recognized Indian tribe.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)



## INDIANS--Continued

### ATTORNEYS--Continued

#### Fees

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)

### CONTRACTS

#### Generally

A person doing business with an Indian tribe lacks standing to raise a violation of the requirements of 25 U.S.C. § 81 (1988).

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

### ECONOMIC ENTERPRISES

#### Generally

Under the circumstances of this case, in which, inter alia, a grant application under the Indian Business Development Program was disapproved on grounds not communicated to the applicant in the disapproval notification, the disapproval will be vacated and the matter referred to the Assistant Secretary--Indian Affairs for the exercise of discretion committed to the



## INDIANS--Continued

### ECONOMIC ENTERPRISES--Continued

#### Generally--Continued

Bureau of Indian Affairs and the issuance of a new decision.

Sherry Wilson Price v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 272 (May 1, 1990)

### EDUCATION AND TRAINING

#### Vocational Training

Under the Bureau of Indian Affairs' adult vocational training program, 25 CFR Part 27, institutional training must be attended on a full-time basis.

Where funds available under the Bureau of Indian Affairs' adult vocational training program are limited, it is a reasonable exercise of discretion for the Bureau to deny funding to an applicant who would simultaneously receive financial assistance under the Bureau's higher education program.

Diana Zarr v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 290 (May 11, 1990)

### FEDERAL RECOGNITION OF INDIAN TRIBES

#### Generally

In determining whether an Indian group is an "Indian tribe" under statutes and regulations which do not define "Indian tribe," Department of the Interior officials are bound by the regulations in 25 CFR Part 83.

Where the Secretary of the Interior has approved the constitution of an Indian tribe, no Department of



## INDIANS--Continued

### FEDERAL RECOGNITION OF INDIAN TRIBES--Continued

#### Generally--Continued

the Interior official has authority to "recognize" a portion of the tribe as a separate tribal entity.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

#### Acknowledgment

Under the terms of a referral to the Board of Indian Appeals by the Secretary of the Interior, where the party requesting reconsideration of a final determination to acknowledge an Indian tribe failed to establish one or more of the grounds for reconsideration at 25 CFR 83(c)(1)-(3), the Board affirms the final determination.

In re Federal Acknowledgment of the San Juan Southern Paiute Tribe, 18 IBIA 213 (Mar. 27, 1990)

## FINANCIAL MATTERS

### Financial Assistance

Decisions concerning whether to approve an application for a grant under the Indian Business Development Program are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

25 CFR 286.3 requires that, in order to be eligible for a grant under the Indian Business Development Program, an economic enterprise must be controlled by the management decisions of its Indian owners.

Honaghaahnii Marketing & Public Relations, Inc. v. Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 144 (Feb. 14, 1990)

The regulations in 25 CFR 278.25 concerning the Core Management grant program, do not set forth a timeframe within which the Bureau of Indian Affairs Area Director must complete the process of reviewing applications.

Washoe Tribe of Nevada & California v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 192 (Mar. 15, 1990)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

consideration was given to all legal prerequisites to the exercise of discretion.

Death Valley Timbi-Sha Shoshone Tribe v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 196 (Mar. 16, 1990)

Yomba Tribal Council, Yomba Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 243 (Apr. 16, 1990)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

McCoy Industries, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 234 (Apr. 11, 1990)

Core Management grants are made available to small tribes to assist them in establishing and maintaining sound management practices and fiscal control systems.

Lovelock Paiute Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 249 (Apr. 16, 1990)



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

The Core Management grant program is administered under authority of the Snyder Act, 25 U.S.C. § 13 (1982), rather than the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.).

La Jolla Band of Mission Indians v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 263 (Apr. 26, 1990)

Under the Bureau of Indian Affairs' adult vocational training program, 25 CFR Part 27, institutional training must be attended on a full-time basis.

Where funds available under the Bureau of Indian Affairs' adult vocational training program are limited, it is a reasonable exercise of discretion for the Bureau to deny funding to an applicant who would simultaneously receive financial assistance under the Bureau's higher education program.

Diana Zarr v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 290 (May 11, 1990)



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In determining whether or not to approve a loan guaranty, the Bureau of Indian Affairs should consider evidence that an Indian applicant has been denied a loan by one or more lending institutions. The mere fact that an application has been denied, however, is not, in and of itself, proof that a loan guaranty should have been granted.

Home Respiratory Services, Inc. & The Will Rogers Bank & Trust Co. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 299 (May 24, 1990)

Decisions concerning whether a request for a loan guaranty under the Indian Loan Guaranty and Insurance Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Because it is improper to base a decision on the lack of information that was never requested from the applicant, if the Bureau of Indian Affairs issues a decision denying an application for assistance under the Indian Financing Act of 1974 and the record shows that the decision was based on the lack of information



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

that was not requested either on the standard application form or as a supplemental submission, the decision is not supported by the record.

Robert Gauthier v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 303 (May 24, 1990)

Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 307 (May 31, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Leonard & Ellen Pueblo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 350 (July 6, 1990)

Decisions concerning whether a loan application under the Indian Loan Program should be approved are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Linda C. McDonald v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 399 (Aug. 21, 1990)



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

When the reason for denial of an application to modify a loan under the Indian Revolving Loan Program is not given in the denial decision, the decision will be vacated and the matter remanded for further proceedings.

Lyle Cochran v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 406 (Aug. 21, 1990)

In general, decisions concerning whether a request for a loan guaranty or grant under one of the business development programs operated by the Bureau of Indian Affairs are committed to the discretion of the Bureau. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lyle D. & Donna J. Griffith v. Acting Portland Area Director, Bureau of Indian Affairs, 19 IBIA 14 (Oct. 19, 1990)

Where a Bureau of Indian Affairs Area Director denies an application for a loan under the Indian Revolving Loan Fund on the grounds that the financial condition of the applicant is inadequate to provide a reasonable prospect of repayment, the administrative record should show how the Area Director reached his conclusions concerning the applicant's financial condition.

S&H Concrete Construction, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 69 (Nov. 15, 1990)



INDIANS--Continued

FINANCIAL MATTERS--Continued

Financial Assistance--Continued

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Yavapai-Prescott Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 19 IBIA 107 (Dec. 3, 1990)

Under 25 CFR 2.7(a), it is the responsibility of a Bureau of Indian Affairs' deciding official to give notice of the decision to all interested parties known to the official.

Edward Parisian v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 109 (Dec. 3, 1990)

HUNTING, FISHING, AND GATHERING RIGHTS

On Reservation

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)



INDIANS--Continued

INDIAN CHILD WELFARE ACT OF 1978

Financial Grant Applications

Generally

A Federal Register notice of the availability of funds under Title II of the Indian Child Welfare Act which states that post marks will not be considered in determining whether an application for funding is timely submitted, places the applicant on notice that it bears the burden of ensuring timely submission of its application.

Grand Traverse Band of Ottawa & Chippewa Indians v. Acting Deputy to the Ass't Secretary--Indian Affairs (Tribal Services), 18 IBIA 450 (Sept. 24, 1990)

Funding

Continued funding under a multi-year Indian Child Welfare Act grant is dependent upon the grantee's progress in achieving the project objectives as set forth in the approved work plans.

Grand Traverse Band of Ottawa & Chippewa Indians v. Acting Deputy to the Ass't Secretary--Indian Affairs (Tribal Services), 18 IBIA 450 (Sept. 24, 1990)



## INDIANS--Continued

### INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

#### Generally

The Core Management grant program is administered under authority of the Snyder Act, 25 U.S.C. § 13 (1982), rather than the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.).

La Jolla Band of Mission Indians v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 263 (Apr. 26, 1990)

A formula for the distribution of Indian Self-Determination Act contract funds among several Indian tribes must be made available for comment and discussion by the tribes prior to negotiation of the contracts for the fiscal year to which the formula applies.

Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 423 (Sept. 13, 1990)

## LANDS

#### Generally

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)



INDIANS--Continued

LANDS--Continued

Aboriginal Title

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine aboriginal title to land.

Noyo River Indian Community v. Acting Sacramento Area Director, Bureau of Indian Affairs, 19 IBIA 63 (Nov. 14, 1990)

Allotments

Generally

An application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1989), for services rendered in obtaining BLM approval of an allotment under the General Allotment Act of 1887, 25 U.S.C. § 334 (1982), is properly denied when no adversary adjudication has occurred or when the Office of Hearings and Appeals has not conducted an adjudication.

Ann Marie Sayers, 115 IBLA 40 (June 8, 1990)

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of



INDIANS--Continued

LANDS--Continued

Allotments--Continued

Generally--Continued

that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Allotments on Public Domain

Generally

An individual Indian landowner's standing to bring an appeal in a matter concerning Indian lands is limited to her own ownership interest unless she has been authorized by other landowners to represent them and is a qualified representative under 43 CFR 1.3.

Decisions of Bureau of Indian Affairs officials concerning whether to seek legislation affecting Indian allotments on the public domain are decisions based on the exercise of discretionary authority. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau.

Cora Marion v. Billings Area Director, Bureau of Indian Affairs, 18 IBIA 395 (Aug. 15, 1990)



## INDIANS--Continued

### LANDS--Continued

#### Fair Rental Value

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

Wapato Orchard Partnership v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 254 (Apr. 24, 1990)

#### Fee Lands

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of



INDIANS--Continued

LANDS--Continued

Fee Lands--Continued

SMCRA (30 U.S.C. § 1291(9)), and thus are subject to OSMRE's jurisdiction.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Individual Trust or Restricted Land

Alienation

The Secretary of the Interior has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

Decisions to approve or disapprove conveyances of Indian trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Sonney Thornburg v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 239 (Apr. 13, 1990)



INDIANS--Continued

LANDS--Continued

Ingress and Egress

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Morana Cheepo v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 131 (Feb. 1, 1990)

Trespass

Damages

Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of the cattle grazing in trespass upon trust or restricted Indian lands.

Damages assessed under 25 CFR 166.24(b) for cattle trespass to trust or restricted Indian lands should be calculated in accordance with 25 CFR 166.24(d), even if it is determined that they are payable to a lessee.

Once the fact of cattle trespass on Indian grazing lands has been established, a prima facie case has been made that forage has been consumed.

Tim Kimmert v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 72 (Nov. 20, 1990)



INDIANS--Continued

LANDS--Continued

Tribal\_Lands

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of SMCRA (30 U.S.C. § 1291(9)), and thus are subject to OSMRE's jurisdiction.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

A revocable land-use permit for tribal land terminates upon the death of the permittee when the permit so provides.

Christine A. Nix v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 387 (July 24, 1990)



INDIANS--Continued

LANDS--Continued

Tribal\_Lands--Continued

The Bureau of Indian Affairs does not have authority to negotiate a lease of tribal land.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

Trust Acquisitions

In the absence of any statutory or regulatory criteria for the approval of a "plan for the acquisition of land in trust status for an Indian tribe" under 25 CFR 151.2(h), a Bureau of Indian Affairs official may devise and employ reasonable criteria to review such a plan.

It was not reasonable for the Bureau of Indian Affairs to disapprove a tribal plan for the acquisition of land in trust status under 25 CFR 151.2(h) on the basis of criteria derived from a provision in the Indian Land Consolidation Act, 25 U.S.C. § 2203 (1983 and 1984 Supps.), concerning sale or exchange of tribal lands.

Absentee Shawnee Tribe of Indians of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 156 (Feb. 20, 1990)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for



INDIANS--Continued

LANDS--Continued

Trust Acquisitions--Continued

that of the Bureau. Rather, it is the Board's responsibility to ensure the proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that these factors were considered must appear in the administrative record. A trust acquisition request can, however, be denied on the basis of less than all of the factors, if BIA's analysis shows that factor or factors weighed heavily against the trust acquisition.

Johnnie Louis McAlpine v. Muskogee Area Director,  
Bureau of Indian Affairs, 19 IBIA 2 (Oct. 10, 1990)

LEASES AND PERMITS

Generally

Notification given to a lessee by the Bureau of Indian Affairs that a lease has expired by its own terms is an appealable action within the meaning of 25 CFR 2.2.

Bekco Oil & Gas Corp. v. Acting Muskogee Area Director,  
Bureau of Indian Affairs, 18 IBIA 202 (Mar. 26, 1990)



INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases.

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

97 I.D. 215

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

No prior notice to the lessee is required when an oil and gas lease for restricted lands of members of the Five Civilized Tribes expires by its own terms.

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)



INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

A revocable land-use permit for tribal land terminates upon the death of the permittee when the permit so provides.

Christine A. Nix v. Acting Sacramento Area Director,  
Bureau of Indian Affairs, 18 IBIA 387 (July 24, 1990)

A guideline of the Bureau of Indian Affairs, published in the Federal Register, which states that "lessees of Indian lands are encouraged to submit all future communitization agreements \* \* \* not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit," does not require that all communitization agreements must be submitted at least 90 days prior to the expiration of the Indian lease in order to be considered or to prevent expiration of the lease.

Black Hawk Oil Co. v. Acting Anadarko Area Director,  
Bureau of Indian Affairs, 18 IBIA 414 (Sept. 13, 1990)

A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law.

The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into



## INDIANS--Continued

### LEASES AND PERMITS--Continued

#### Generally--Continued

the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the total minimum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

ASARCO Inc., 116 IBLA 120 (Sept. 21, 1990)

Under 25 U.S.C. § 415 (1988), leases of trust or restricted land must be approved by the Secretary of the Interior or his authorized delegate. A provision which is specifically omitted from a lease before approval is granted is not part of the lease and cannot be made part of the lease by unilateral action of the Indian leasor.

Mr. & Mrs. W. A. Merrill v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 81 (Nov. 23, 1990)

#### Assignments

An assignment of a lease of trust or restricted Indian lands is not effective until approved by the Secretary of the Interior or his delegate.

The Bureau of Indian Affairs is not required to give notice of actions relating to the management of a



INDIANS--Continued

LEASES AND PERMITS--Continued

Assignments--Continued

lease of trust or restricted Indian lands to a person who is not a party to the lease.

A person who is not a party to a lease of trust or restricted Indian lands lacks standing to challenge actions taken by the Bureau of Indian Affairs in the management of the lease.

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 222 (Mar. 28, 1990)

Where a lease of Indian land is assigned in violation of the requirements for assignment contained in the lease, and the lessee fails to cure the violation after notice, the lease is properly cancelled under 25 CFR 162.14.

Douglas M. Rhead v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 257 (Apr. 25, 1990)

Cancellation or Revocation

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)



INDIANS--Continued

LEASES AND PERMITS--Continued

Cancellation or Revocation--Continued

Where a lease of Indian land is assigned in violation of the requirements for assignment contained in the lease, and the lessee fails to cure the violation after notice, the lease is properly cancelled under 25 CFR 162.14.

Douglas M. Rhead v. Acting Portland Area Director, Bureau of Indian Affairs, 18 IBIA 257 (Apr. 25, 1990)

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

97 I.D. 215

A Bureau of Indian Affairs official is bound by a decision in an administrative appeal which has become final for the Department of the Interior.

A Bureau of Indian Affairs Superintendent must follow the procedures in 25 CFR 162.14 when cancelling a lease of Indian land issued under 25 CFR Part 162.

Bryan Knows Ground et al. v. Acting Billings Area Director, Bureau of Indian Affairs, 19 IBIA 50 (Nov. 6, 1990)



## INDIANS--Continued

### LEASES AND PERMITS--Continued

#### Cancellation\_or Revocation--Continued

Where a lessee of Indian trust land has been given ample opportunity to cure a breach of his lease and has failed to do so, 25 CFR 162.14 does not require that he be given yet another opportunity.

Alan & Bernice Mast v. Aberdeen Area Director, Bureau of Indian Affairs, 19 IBIA 96 (Nov. 28, 1990)

#### Commercial Leases

A lease of the surface of an Indian allotment for uses incidental to the extraction of underlying Federal coal is a lease for business purposes within the meaning of 25 U.S.C. § 415 (1982).

Matilda Arviso et al. v. Ass't Navajo Area Director, Bureau of Indian Affairs, 18 IBIA 118 (Jan. 18, 1990)

#### Farming and Grazing

Decisions governing the granting of a farming lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)



INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing--Continued

Under 25 U.S.C. § 466 (1988) and 25 CFR Part 166, the Bureau of Indian Affairs' principal responsibilities with respect to Indian grazing lands are to protect them and to promote their efficient use for the benefit of the Indian owners.

Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of the cattle grazing in trespass upon trust or restricted Indian lands.

Damages assessed under 25 CFR 166.24(b) for cattle trespass to trust or restricted Indian lands should be calculated in accordance with 25 CFR 166.24(d), even if it is determined that they are payable to a lessee.

Once the fact of cattle trespass on Indian grazing lands has been established, a prima facie case has been made that forage has been consumed.

Tim Kimmet v. Billings Area Director, Bureau of Indian Affairs, 19 IBIA 72 (Nov. 20, 1990)

Negotiated Leases

The Bureau of Indian Affairs does not have authority to negotiate a lease of tribal land.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)



## INDIANS--Continued

### LEASES AND PERMITS--Continued

#### Rental Rates

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

Wapato Orchard Partnership v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 254 (Apr. 24, 1990)

### MINERAL RESOURCES

#### Mining

##### Royalties

A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law.

The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the



INDIANS--Continued

MINERAL RESOURCES--Continued

Mining--Continued

Royalties--Continued

total minimum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

ASARCO Inc., 116 IBLA 120 (Sept. 21, 1990)

Oil and Gas

Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Louis Kahan & the Louis Kahan Trust v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 180 (Mar. 2, 1990)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)



INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases.

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

97 I.D. 215

No prior notice to the lessee is required when an oil and gas lease for restricted lands of members of the Five Civilized Tribes expires by its own terms.

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency



INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

action complained of was erroneous or not supported by substantial evidence.

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

In determining whether a saltwater disposal well is leaking, the Bureau of Indian Affairs may consider as probative evidence the results of an Environmental Protection Agency mechanical integrity test of the well which is conducted pursuant to that agency's Underground Injection Control program under the Safe Drinking Water Act, 41 U.S.C. § 300h (1982).

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

25 CFR 226.33 prohibits drilling within 300 feet of the boundary of an Osage oil and gas lease without the written permission of the Osage Agency Superintendent.

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 444 (Sept. 21, 1990)

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.



INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

Disagreement with the terms of a signed contract does not negate those terms.

Thomas J. Sweeney v. Acting Anadarko Area Director,  
Bureau of Indian Affairs, 19 IBIA 101 (Nov. 29, 1990)

Allotted Lands

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee  
Area Director, Bureau of Indian Affairs, 18 IBIA 353  
(July 6, 1990)

Communitization Agreements

A guideline of the Bureau of Indian Affairs, published in the Federal Register, which states that "lessees of Indian lands are encouraged to submit all future communitization agreements \* \* \* not less than 90 days prior to the date of expiration of the first Indian lease in the proposed unit," does not require that all communitization agreements must be submitted at least 90 days prior to the expiration of the Indian lease in order to be considered or to prevent expiration of the lease.

The Bureau of Indian Affairs properly declines to approve a proposed communitization agreement when that



INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Communitization Agreements--Continued

agreement is first filed in approvable form after the expiration of the underlying Indian lease.

Black Hawk Oil Co. v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 414 (Sept. 13, 1990)

OSAGE HEADRIGHTS

The Secretary of the Interior, as trustee under a testamentary trust including an Osage headright interest, is bound to carry out the testamentary restrictions imposed by the testator.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 339 (July 3, 1990)

SOCIAL SERVICES

In accordance with 25 CFR 271.4(h), a tribal contractor under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1982 and Supps.), must apply the eligibility criteria for the contracted program which are established in the Bureau of Indian Affairs' regulations governing the program.

Under the Bureau of Indian Affairs' social services program regulations, the eligibility criteria for miscellaneous assistance in 25 CFR 20.23 do not



## INDIANS--Continued

### SOCIAL SERVICES--Continued

incorporate the eligibility criteria for general assistance in 25 CFR 20.21.

Muscogee (Creek) Nation v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 135 (Feb. 1, 1990)

## TIMBER RESOURCES

### Generally

The sale of timber on trust or restricted land by an Indian tribe is controlled by 25 U.S.C. § 407 (1988), not by 25 U.S.C. § 81 (1988).

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

### Timber Sales Contracts

#### Breach and Damages

Failure to make advance deposits required under a contract for the sale of Indian timber or to begin operations constitutes a breach of the contract.

Performance under a contract for the sale of Indian timber is not excused by the doctrine of commercial impracticality based upon a downturn in the timber market when the possibility of such a downturn is not shown to have been an unexpected or unforeseeable occurrence, the risk of such a downturn is allocated to the purchaser by the terms of the contract,



INDIANS--Continued

TIMBER RESOURCES--Continued

Timber\_Sales\_Contracts--Continued

Breach and Damages--Continued

and the purchaser has not shown that performance is commercially impracticable.

Bernell Kombol, dba Grass Mountain Logging Co. v. Acting Ass't Portland Area Director (Economic Development), Bureau of Indian Affairs, 19 IBIA 123 (Dec. 26, 1990)

TRIBAL GOVERNMENT

Generally

The Bureau of Indian Affairs properly declines to recognize actions taken at a tribal meeting at which a quorum is not present.

Joy Sundberg v. Acting Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 207 (Mar. 27, 1990)

In determining whether an Indian group is an "Indian tribe" under statutes and regulations which do not define "Indian tribe," Department of the Interior officials are bound by the regulations in 25 CFR Part 83.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)



INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Erin Forrest v. Sacramento Area Director, Bureau of Indian Affairs, 18 IBIA 372 (July 19, 1990)

Where the Secretary of the Interior has approved the constitution of an Indian tribe, no Department of the Interior official has authority to "recognize" a portion of the tribe as a separate tribal entity.

Edwards, McCoy & Kennedy & Western Shoshone Business Council of the Duck Valley Reservation v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 454 (Sept. 24, 1990)

Elections

Where an Indian tribe resolves an election dispute in a valid tribal forum, neither the Bureau of Indian Affairs nor the Board of Indian Appeals may disregard the resolution reached by that forum.

Beverly A. Smalley et al. v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 459 (Sept. 27, 1990)



INDIANS--Continued

TRIBAL POWERS

Tribal Sovereignty

A tribal court decision concerning the condemnation of an undivided nontrust interest in an Indian allotment is not reviewable by the Board.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)

TRUST RESPONSIBILITY

The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs, 18 IBIA 315 (July 2, 1990)

97 I.D. 215

A non-Indian lacks standing to raise an alleged violation of the Federal trust responsibility.

Earl Clausen, dba Earl Clausen Farms, Inc. v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 56 (Nov. 14, 1990)



## INDIANS--Continued

### WATER AND POWER RESOURCES

#### Irrigation Projects

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

#### Water Rights

Water claimed under potentially prior tribal fishing rights is not subject to the "just and equal distribution" requirement of 25 U.S.C. § 381 (1988).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Portland Area Director, Bureau of Indian Affairs, 19 IBIA 31 (Oct. 23, 1990)

## INTERVENTION

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at



INTERVENTION--Continued

the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

JUDICIAL REVIEW

(See also Administrative Procedure)

When it becomes necessary to protect the water supply of a Federal reclamation project, the United States is obligated and entitled to make filings in general stream adjudications on behalf of project water rights to which the United States holds legal title.

The United States is not obligated to make water rights filings or present evidence of beneficial use on behalf of individual water users. In addition, when the United States files in general stream adjudications in states that do not distinguish between storage rights and rights to receive water, it has no evidentiary burden to carry for the individual water users. However, by making the filings of Reclamation project water rights held in its name, the United States protects its interest in the project water rights, and the project water rights users are afforded the opportunity to protect their water rights, based on their ability to establish beneficial use of water.

Filings of Claims for Water Rights in General Stream Adjudications, M-36966 (July 6, 1989) 97 I.D. 21



## MILLSITES

(See also Mining Claims)

### GENERALLY

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining or milling purposes, the Government has established a prima facie case of invalidity because such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

Where a millsite claim is located in conjunction with lode mining claims, an applicant for mineral patent must show that the millsite claim is located on nonmineral land and is used or occupied for mining operations. 30 U.S.C. § 42(a) (1982).

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

B. K. Lowndes et al., 113 IBLA 321 (Mar. 14, 1990)

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite



## MILLSITES--Continued

### GENERALLY--Continued

claim for purposes not related to mining operations constitutes a trespass.

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

### DETERMINATION OF VALIDITY

Where a millsite claim is located in conjunction with lode mining claims, an applicant for mineral patent must show that the millsite claim is located on nonmineral land and is used or occupied for mining operations. 30 U.S.C. § 42(a) (1982).

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude



## MILLSITES--Continued

### DETERMINATION OF VALIDITY--Continued

further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

## MINERAL LANDS

(See also Mining Claims)

### DETERMINATION OF CHARACTER OF

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

## LEASES

Gold and silver on public domain lands are generally not subject to mineral leasing, but may be claimed only under the authority of the Mining Act of 1872, subject to the availability of the lands to mineral entry.

William Bade, 112 IBLA 312 (Jan. 10, 1990)



## MINERAL LANDS--Continued

### LEASES--Continued

An application for a noncompetitive fringe acreage lease under 43 CFR Subpart 3565 is properly rejected when there is competitive interest in the resource on the part of the holder of another active mining unit in the area.

United States Gypsum Co. (On Reconsideration), 115 IBLA 297 (July 31, 1990)

## MINERAL LEASING ACT

(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits)

### GENERALLY

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the 1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful exploitation need not be shown, and a preference right



## MINERAL LEASING ACT--Continued

### GENERALLY--Continued

lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made



## MINERAL LEASING ACT--Continued

### GENERALLY--Continued

as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a



MINERAL LEASING ACT--Continued

GENERALLY--Continued

reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

Readjustment of a potassium lease is an event that occurs at the end of the lease term and may signal new minimum royalty requirements, depending upon regulations in force at the time of readjustment.

A decision to readjust the annual minimum royalty payable for a potassium lease to \$3 per acre will be affirmed where the regulation in effect at readjustment provided for a minimum \$3 royalty for leases readjusted after the effective date of the regulation. For leases readjusted before the effective date of the regulation authorizing the \$3 rate however, the royalty was correctly set at \$2, as provided by regulations then in effect.

Texasgulf, Inc., 114 IBLA 66 (Apr. 6, 1990)

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)



## MINERAL LEASING ACT--Continued

### GENERALLY--Continued

An appraisal of fair market value for a natural gas compressor site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where BLM has conducted an appraisal of fair market value of a natural gas compressor site right-of-way by utilizing comparable sales data for other compressor sites, its rental determination based thereon will not be overturned based on allegations that such sales are outdated, where the appraisal made negative adjustments for time and the sales presented by the right-of-way holder as comparable were not sales for compressor sites.

Western Field Production, Inc., 116 IBLA 225 (Oct. 12, 1990)

### CIVIL PENALTIES

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)



## MINERAL LEASING ACT--Continued

### ROYALTIES

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal coal lease, and BLM's decision and the accompanying case record fail to disclose a rational basis for BLM's conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside and the case remanded for a new determination and inclusion of BLM's analysis in the record.

Kanawha & Hocking Coal & Coke Co., 112 IBLA 365  
(Jan. 19, 1990)

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

Operating leases are a proper component of a transportation allowance for a CO2 pipeline which is required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating costs and no rational basis for such a limitation is given in the decision or contained in the record.

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the



MINERAL LEASING ACT--Continued

ROYALTIES--Continued

transportation allowance is calculated will be upheld as reasonable.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

Effective Feb. 26, 1990, 43 CFR 3473.3-2 requires payment of a royalty of 8 percent of the value of coal removed from an underground mine for all new leases issued under the Mineral Leasing Act of 1920 and for all previously issued leases at the time of the next scheduled readjustment of the lease.

Utah Power & Light Co., 115 IBLA 366 (Aug. 15, 1990)

The Minerals Management Service has been delegated the royalty management functions of the Secretary including the authority to audit a lessee's records to determine royalty liability.

The authority of the Minerals Management Service to conduct an audit of a coal lessee's records to determine royalty liability is properly distinguished from the authority of the Minerals Management Service under 30 CFR 217.200 to require a lessee to retain an independent certified public accountant to conduct a self-audit.

A royalty valuation decision will be affirmed on appeal where the record establishes a reasonable basis for the valuation using one or more of the factors enumerated in the regulation. The fact that another regulatory factor was not used as a basis for valuation will not justify a remand of the case in the absence of a showing that the failure to use that factor was arbitrary and capricious.

Lone Star Steel Co., 117 IBLA 96 (Dec. 3, 1990)



## MINERAL LEASING ACT FOR ACQUIRED LANDS

### GENERALLY

When a permittee fails to reclaim the land after expiration of the prospecting permit, BLM may undertake reclamation activities and seek reimbursement from the bond required by the regulations found at 43 CFR Part 3500, which is conditioned upon compliance with all terms and conditions of the prospecting permit.

Gerald Dee Foster, 115 IBLA 233 (July 12, 1990)

## MINERALS EXPLORATION

Oil and gas geophysical exploration on public lands, the surface of which is administered by BLM, requires BLM approval.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of



#### MINERALS EXPLORATION--Continued

BLM's decision if it is reasonable and supported by the record on appeal.

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

#### MINERAL MANAGEMENT SERVICE

##### GENERALLY

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)



## MINERAL MANAGEMENT SERVICE--Continued

### GENERALLY--Continued

The Conservation Division Manual is an administrative manual which governed the internal operations of the Conservation Division, Geological Survey. It does not have the force of law and its provisions are guidelines rather than rules which are binding on the Board of Land Appeals. Review is not limited to determining whether its provisions were correctly applied and the Board may consider whether application of the provisions is arbitrary, capricious, an abuse of discretion, or contrary to law.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

Where natural gas produced from a Federal lease is sold under an arrangement where the buyer pays the maximum lawful price allowed under the Natural Gas Policy Act of 1978 and also reimburses the producer for severance taxes it paid to the State of Montana, both the maximum Natural Gas Policy Act price and the severance tax reimbursement together constitute "gross proceeds" received for the gas from the lease. The



MINERAL MANAGEMENT SERVICE--Continued

GENERALLY--Continued

Minerals Management Service properly includes such severance tax reimbursements when computing the value of gas for royalty purposes.

Miami Oil Producers, Inc., 116 IBLA 345 (Oct. 30, 1990)

MINING CLAIMS

(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act)

GENERALLY

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must show that he was prevented from performance of the work by denial of access to the claims for the purpose of doing such work. Failure to show that one of the impediments to such performance listed by 30 U.S.C. § 28b (1982), prevented access to the mining claims requires rejection of a deferment application.

Wheaton E. Blanchard, 112 IBLA 261 (Jan. 4, 1990)

When an exposure of locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)



## MINING CLAIMS--Continued

### GENERALLY--Continued

A patent may be issued to a corporation organized under the laws of the United States or any state or territory irrespective of the ownership of the stock of the corporation by persons, corporations, or associations who are not citizens of the United States.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

### ABANDONMENT

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Howard G. Willison, 114 IBLA 323 (May 22, 1990)



## MINING CLAIMS--Continued

### ABANDONMENT--Continued

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

### ASSESSMENT WORK

To be entitled to a deferment from the requirement to perform annual assessment work on mining claims, a petitioner must show that he was prevented from performance of the work by denial of access to the claims for the purpose of doing such work. Failure to show that one of the impediments to such performance listed by 30 U.S.C. § 28b (1982), prevented access to the mining claims requires rejection of a deferment application.

Wheaton E. Blanchard, 112 IBLA 261 (Jan. 4, 1990)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

James L. Gleave, 112 IBLA 281 (Jan. 5, 1990)



## MINING CLAIMS--Continued

### ASSESSMENT WORK--Continued

When a single mining claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982), on two occasions and given two mining recordation serial numbers, the files should be merged and one of the serial numbers canceled. If between the two serial numbers all requisite filings have been made, the claim should not be deemed abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

The BLM manual requires the issuance of a receipt for affidavit of assessment work. Thus, where BLM date stamps and returns a cover letter which lists the affidavits of assessment submitted for filing without noting thereon or in the case file that any of the documents referred to in the letter were not enclosed, it is presumed that the return of the cover letter was intended to acknowledge receipt of all the documents listed therein.

International Metals & Energy, 114 IBLA 221 (Apr. 25, 1990)

A petition for the deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982), where "legal impediments" exist which affect the right of the mining claimant to enter upon the land or gain access to the boundaries thereof. A court injunction which precludes a claimant from any mining activities in a wilderness area without the approval of the Forest Service does not constitute a legal impediment, even if it were applicable to the claims for which deferment were sought, since such an order is not a legal impediment to entry upon the claims; rather, it imposes a condition precedent to undertaking mining activities.

Under 30 U.S.C. § 28b (1982), the annual assessment work requirement imposed by 30 U.S.C. § 28 (1982), may be deferred by the Secretary of the Interior as to any mining claim or group of claims upon the necessary showing being made. The deferment statute is inapplicable to tunnel sites because they are not mining



## MINING CLAIMS--Continued

### ASSESSMENT WORK--Continued

claims and because no annual assessment work for tunnel sites is dictated by 30 U.S.C. § 28 (1982).

David Doremus, 115 IBLA 336 (Aug. 9, 1990)

## COMMON VARIETIES OF MINERALS

### Generally

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

### Special Value

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value, as reflected in a higher market price or reduced costs of production.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)



## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Special Value--Continued

If a deposit of limestone is to be subject to location as a valuable mineral deposit under the mining laws, it must be shown to have some property giving it distinct and special value. Suitability of the deposit for production of agricultural lime does not establish that the stone is subject to location, without proof that the limestone has distinct and special properties giving it special value for that purpose.

Marketability is not the sole test of the validity of a mining claim for limestone. Unless it is shown to have some special property that excludes it from the operation of the Common Varieties Act, limestone cannot be located as a valuable mineral under the mining laws.

If a deposit of limestone is to be subject to location under the mining laws as building stone, it must be shown to have some distinct and special property giving it special value for that purpose. Although price is a factor in showing that stone has such a property, a showing that the stone can be marketed at a profit does not alone establish the existence of a special property in the stone.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)

#### CONTESTS

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim and found the quantity and



## MINING CLAIMS--Continued

### CONTESTS--Continued

quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

A contest complaint is required to contain a statement in clear and concise language of the facts constituting the grounds of the contest. A party seeking a hearing as to the mineral character of land which has been subject to a prior Departmental hearing must make a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

An affidavit by a contest complainant is not a substitute for an affidavit of a witness corroborating the factual allegations of the complaint as required by 43 CFR 4.450-4(c). In the absence of an affidavit of a corroborating witness, a private contest complaint is properly dismissed.

Although 30 U.S.C. §§ 29, 30 (1982), do not authorize the Department to rule on the merits of an adverse claim, it is within the Department's authority to determine whether a document presents an adverse claim within the meaning of the statutes. The issue whether land is mineral or nonmineral in character is within the exclusive jurisdiction of the Department of the Interior and for this reason a conflict between mineral and nonmineral claimants does not raise an



MINING CLAIMS--Continued

CONTESTS--Continued

"adverse claim" within the meaning of the term in the statutes.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value, as reflected in a higher market price or reduced costs of production.

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to



## MINING CLAIMS--Continued

### CONTESTS--Continued

overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)

### DETERMINATION OF VALIDITY

Placer mining claims partially located on lands patented without a reservation of minerals to the United States are null and void ab initio to the extent they include such lands.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

When an exposure of locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the



MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

When a mineral locator has filed a location certificate with BLM within 90 days of the date of the location of the claim as required by 43 U.S.C. § 1744(b) (1982), it is error for BLM to later reject the recordation of the claim. BLM's decision cannot change the fact the locator has complied with the statute. The fact the claim has been recorded with BLM, however, does not establish its validity.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

The Government is not collaterally estopped to determine the validity of an unpatented mining claim even where the Government has previously unsuccessfully contested a neighboring mining claim encompassing an arguably similar mineral deposit.

A deposit of sand will be considered a deposit of a common variety of mineral where the claimant fails to



## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

overcome by a preponderance of the evidence the Government's prima facie case that the sand does not have a property which gives it a distinct and special value, as reflected in a higher market price or reduced costs of production.

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277  
(July 26, 1990)

### DISCOVERY

#### Generally

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

When an exposure of locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can



MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

reasonably contemplate operations on a series of contiguous claims.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Marketability

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

A mining claim for a common variety of sand is properly declared invalid where the claimant fails to overcome by a preponderance of the evidence the Government's prima facie case that the sand was not marketable at a profit prior to July 23, 1955.

United States v. Robert D. Fisher, 115 IBLA 277 (July 26, 1990)



MINING CLAIMS--Continued

HEARINGS

Absent a patent application, in a mining claim contest hearing there is no requirement that a mining claimant show that a contested claim is valid. Rather, the claimant's burden is to preponderate on the issues raised by the evidence.

United States v. Michael R. Ware, 113 IBLA 1 (Jan. 25, 1990)

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining law.

A prima facie case showing invalidity of a limestone mining claim located after July 23, 1955, for use as decorative stone is established by proof that the stone is a common variety lacking any property giving it distinct and special value.

New evidence offered in support of an application for a rehearing must tend to show that the party seeking rehearing has some likelihood of success if the application is to be allowed. The applicant for a rehearing must also explain why the evidence offered on



MINING CLAIMS--Continued

HEARINGS--Continued

appeal was not presented at the original hearing, if the evidence could have been available then.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)

LANDS SUBJECT TO

Placer mining claims partially located on lands patented without a reservation of minerals to the United States are null and void ab initio to the extent they include such lands.

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

Those portions of mining claims located on land subject to a valid, ongoing, and pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)



MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

A placer mining claim is properly declared null and void to the extent that it includes land patented without a reservation of minerals to the United States.

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)



MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)



## MINING CLAIMS--Continued

### LANDS SUBJECT TO--Continued

Where a Secretarial order withdrawing land from the location of mining claims is amended by a subsequent public land order deleting certain land from the withdrawal and BLM has administered the land as unwithdrawn, a decision declaring mining claims located thereafter on land deleted from the withdrawal to be null and void ab initio will be reversed.

William M. Stokes, William L. Stokes, Jeffery B. Hulen,  
115 IBLA 28 (June 5, 1990)

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)



## MINING CLAIMS--Continued

### LANDS SUBJECT TO--Continued

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

### LOCATION

The boundaries of a placer claim may not be extended over patented land or land otherwise not open to location for the purpose of claiming unappropriated portions of land within the boundaries.

Under 30 U.S.C. § 36 (1982), joint entry of a placer claim comprised of up to 160 acres may be made by two or more persons, or associates of persons, having contiguous claims of any size, although such claims may be less than 10 acres each. Because parcels of land within a placer claim must be contiguous, the owners of a placer mining claim which includes noncontiguous parcels must select which tract they wish to preserve under each claim.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)



## MINING CLAIMS--Continued

### LOCATION--Continued

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)



## MINING CLAIMS--Continued

### LOCATION--Continued

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining law.

If a deposit of limestone is to be subject to location as a valuable mineral deposit under the mining laws, it must be shown to have some property giving it distinct and special value. Suitability of the deposit for production of agricultural lime does not establish that the stone is subject to location, without proof that the limestone has distinct and special properties giving it special value for that purpose.

Marketability is not the sole test of the validity of a mining claim for limestone. Unless it is shown to have some special property that excludes it from the operation of the Common Varieties Act, limestone cannot be located as a valuable mineral under the mining laws.

If a deposit of limestone is to be subject to location under the mining laws as building stone, it must be shown to have some distinct and special property giving it special value for that purpose. Although price is a factor in showing that stone has such a property, a showing that the stone can be marketed at a profit does not alone establish the existence of a special property in the stone.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)



## MINING CLAIMS--Continued

### LOCATION--Continued

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)

### LODE CLAIMS

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

### MARKETABILITY

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. This standard has been supplemented by the marketability text, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is



## MINING CLAIMS--Continued

### MARKETABILITY--Continued

a reasonable likelihood of success that a paying mine can be developed.

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

### MILLSITES

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining or milling purposes, the Government has established a prima facie case of invalidity because such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

Where a millsite claim is located in conjunction with lode mining claims, an applicant for mineral patent must show that the millsite claim is located on nonmineral land and is used or occupied for mining operations. 30 U.S.C. § 42(a) (1982).

United States v. Shiny Rock Mining Corp., 112 IBLA 326 (Jan. 12, 1990)

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass.

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite



## MINING CLAIMS--Continued

### MILLSITES--Continued

claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

### MINERAL LANDS

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109

### PATENT

A patent may be issued to a corporation organized under the laws of the United States or any state or territory irrespective of the ownership of the stock of the corporation by persons, corporations, or associations who are not citizens of the United States.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (Mar. 12, 1990) 97 I.D. 109



## MINING CLAIMS--Continued

### PATENT--Continued

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

Under 43 CFR 1821.2-2(a), BLM properly rejects an application for a mineral patent executed more than 10 days prior to filing.

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decision rejecting a mineral patent application as containing information sufficient to confirm compliance with governing law),



## MINING CLAIMS--Continued

### PATENT--Continued

the Board of Land Appeals lacks authority to consider them.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

Upon issuance of a mineral patent for a mining claim in a wilderness area in a National Forest, fee simple title to the land described in the patent passes to the patentee. The land is private land, no longer subject to the mining laws, and the Bureau of Land Management has no authority to entertain challenges to regulation of surface uses of other land under Forest Service jurisdiction.

Virgil Horn, Marcella Horn, 117 IBLA 10 (Nov. 21, 1990)

### PLACER CLAIMS

The boundaries of a placer claim may not be extended over patented land or land otherwise not open to location for the purpose of claiming unappropriated portions of land within the boundaries.

Under 30 U.S.C. § 36 (1982), joint entry of a placer claim comprised of up to 160 acres may be made by two or more persons, or associates of persons, having contiguous claims of any size, although such claims may be less than 10 acres each. Because parcels of land within a placer claim must be contiguous, the owners of a placer mining claim which includes noncontiguous parcels must select which tract they wish to preserve under each claim.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)



## MINING CLAIMS--Continued

### PLACER CLAIMS--Continued

Pursuant to 30 U.S.C. § 36 (1982), and 43 CFR 3842.1-3, placer mine locations may not contain noncontiguous tracts of land.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)

### PLAN OF OPERATIONS

An appellant bears the burden of showing error in a BLM decision denying approval of a mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

Robert L. Baldwin, Sr., & E. Rose Baldwin, 116 IBLA 84 (Sept. 17, 1990)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976, or if denial of exercise



MINING CLAIMS--Continued

PLAN OF OPERATIONS--Continued

of valid existing rights will preclude the claimant's development of the claim.

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288  
(Oct. 23, 1990)

BLM's FONSI with respect to a proposed expansion of a mining operation will be affirmed if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal.

Although an EA for a proposed expansion of a mining operation to build a new cyanide heap leaching pad may be "tiered" to an earlier EIS, the earlier document must contain adequate information to address the alternatives. Where the EIS does not address the



## MINING CLAIMS--Continued

### PLAN OF OPERATIONS--Continued

full extent of cumulative impacts of retention of cyanide in abandoned heaps, and where BLM is actively reviewing this question prior to allowing leaching of ore to begin on the new pad, BLM's decision to allow the permit amendment will be modified to make clear that BLM must consider whether to prepare a supplemental EIS considering cumulative impacts before allowing leaching operations to begin.

Sec. 2 of the AIRFA does not prohibit BLM from adopting a land use that conflicts with traditional Indian religious beliefs or practices. BLM complies with AIRFA if, in the decisionmaking process, it obtains and considers the views of the Indians, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263

### POWERSITE LANDS

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)



## MINING CLAIMS--Continued

### POWERSITE LANDS--Continued

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

### RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)



MINING CLAIMS--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK  
OR NOTICE OF INTENTION TO HOLD--Continued

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim located on or after Oct. 21, 1976, is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office on or before Dec. 30 of each year following the calendar year of location of the claim. Failure to file one of the instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

James R. Tucker, 116 IBLA 222 (Oct. 4, 1990)

Departmental regulation 43 CFR 3833.1-3(c) requires that annual filings made pursuant to 43 CFR 3833.2 regarding evidence of assessment work and/or notice of intention to hold be accompanied by a nonrefundable service charge of \$5 for each mining claim, millsite, or tunnel site. This requirement became effective on Jan. 3, 1989, the first business day of that year, and applies to any filing made on or after that date. The fact that a mining claimant may have



MINING CLAIMS--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK  
OR NOTICE OF INTENTION TO HOLD--Continued

performed his assessment work and executed the documents prior to that date does not relieve him of the obligation to comply with this requirement.

Amada Mineral Corp., 116 IBLA 257 (Oct. 17, 1990)

RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the location of the claims, failing which the claims are properly declared abandoned and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

A mining claimant may correct the misidentification of a township on a map filed pursuant to the regulations implementing 43 U.S.C. § 1744 (1982).

The Carrow Co., 115 IBLA 102 (June 26, 1990)



## MINING CLAIMS--Continued

### RECORDATION OF CERTIFICATE OR NOTICE OF LOCATION--Continue

Regulation 43 CFR 3833.1-3(b), which increased the service charge to \$10 for recording a notice of location with BLM, was effective Jan. 3, 1989. Notices of location mailed on Dec. 31, 1988, received by BLM on Jan. 4, 1989, and accompanied by a \$5 service charge per claim are properly rejected by BLM upon expiration of a 30-day compliance period authorized by 43 CFR 3833.1-4(a) without payment of a \$5 balance per claim. At the conclusion of the 30-day compliance period, an appeals period of 30 days commences.

Instruction Memorandum No. 89-222 (Jan. 18, 1989) directs BLM to indicate, in its interlocutory decisions giving notice of deficient fees, that the agency will apply the submitted fees to process the claims in the order listed on the document submitted by the owner.

Herbert M. Cole et al., 115 IBLA 272 (July 26, 1990)

### RELOCATION

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

Rights acquired under a relocation of a mining claim abandoned pursuant to 43 U.S.C. § 1744 (1982), will not relate back to the date of location of the original claim but only to the date of the relocation.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)



## MINING CLAIMS--Continued

### SURFACE USES

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that the mining claimants and the operators have failed to operate in such a manner as to prevent undue or unnecessary degradation or to complete reclamation of a millsite to the standards set forth in 43 CFR 3809.1-3.

B. K. Lowndes et al., 113 IBLA 321 (Mar. 14, 1990)

### TUNNEL SITES

Under 30 U.S.C. § 28b (1982), the annual assessment work requirement imposed by 30 U.S.C. § 28 (1982), may be deferred by the Secretary of the Interior as to any mining claim or group of claims upon the necessary showing being made. The deferment statute is inapplicable to tunnel sites because they are not mining claims and because no annual assessment work for tunnel sites is dictated by 30 U.S.C. § 28 (1982).

David Doremus, 115 IBLA 336 (Aug. 9, 1990)

### WITHDRAWN LAND

Mining claims located on lands closed to mineral entry are null and void ab initio and no property rights are created. Therefore, no deprivation of property rights occurs when such claims are declared null and void ab initio.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)



MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

Where a Secretarial order withdrawing land from the location of mining claims is amended by a subsequent public land order deleting certain land from the withdrawal and BLM has administered the land as unwithdrawn, a decision declaring mining claims located thereafter on land deleted from the withdrawal to be null and void ab initio will be reversed.

William M. Stokes, William L. Stokes, Jeffery B. Hulen, 115 IBLA 28 (June 5, 1990)



#### MINING CLAIMS RIGHTS RESTORATION ACT

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

#### NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (See also Environmental Policy Act)

##### ENVIRONMENTAL STATEMENTS

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

Southern Utah Wilderness Alliance, 114 IBLA 326 (May 22, 1990)

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A finding of no significant impact will not be affirmed on appeal where the record suggests possible impacts on the environment, but the environmental assessment contains



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

no discussion of environmental impacts of either the proposed action or the alternatives.

Rex Kipp, Jr., Justin Kipp, 115 IBLA 1 (May 30, 1990)

Compliance with the National Environmental Policy Act of 1969 requires BLM to take a hard look at the issues, identify relevant areas of environmental concern, and, where no EIS is prepared, make a convincing case that the potential environmental impacts are significant. Where a finding of no significant impact is based on mitigating measures designed to minimize the impacts, analysis of the proposed mitigating measures and how effective they would be in eliminating adverse environmental impacts is required.

Idaho Natural Resources Legal Foundation, Inc., et al., 115 IBLA 88 (June 21, 1990)

A FONSI will be affirmed if the record supports a conclusion that all relevant areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359  
(Aug. 14, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. BLM properly rejects a selection application for a historical place when the record fails to establish that the site has historic significance for Native history or culture and the site does not meet the criteria set forth at 43 CFR 2653.5.

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

NAVIGABLE WATERS

Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)



#### NAVIGABLE WATERS--Continued

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177  
(Apr. 23, 1990) 97 I.D. 171

#### NOTICE

##### GENERALLY

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

The Bureau of Indian Affairs is not required to give notice of actions relating to the management of a lease of trust or restricted Indian lands to a person who is not a party to the lease.

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 222 (Mar. 28, 1990)



NOTICE--Continued

GENERALLY--Continued

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

One who deals with the Government is presumed to know the applicable laws and regulation, and the United States cannot be bound or estopped by an act of its officers or agents if to estop the Government would undermine the correct enforcement of a particular statute or regulation.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)



## OIL AND GAS

### GENERALLY

Oil and gas geophysical exploration on public lands, the surface of which is administered by BLM, requires BLM approval.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concerns have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if it is reasonable and supported by the record on appeal.

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible with the preservation of the wilderness environment. 30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)



## OIL AND GAS--Continued

### PIPELINES

#### Generally

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

## OIL AND GAS LEASES

(See also Mineral Leasing Act, Outer Continental Shelf Lands Act)

### GENERALLY

Where a Federal lessee is required to pay royalty for part of a lease on a sliding scale at a higher rate than 12-1/2 percent, the part paying at the higher rate is considered an entirety for purposes of royalty calculation, and gross production from a producing well on that portion is properly used to determine the sliding-scale royalty rate.

Conoco, Inc., 113 IBLA 47 (Jan. 30, 1990)



OIL AND GAS LEASES--Continued

GENERALLY--Continued

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

Cancellation of overriding royalty interests in an oil and gas lease and the requirement to repay overriding royalties does not constitute an adversary adjudication under sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. IV 1986), thus entitling the prevailing party on appeal to recover attorney fees and expenses.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

Payment of the balance of the bonus bid at a competitive lease sale is properly construed as timely where payment is received by BLM on the seventh working day after the lease sale within the time allowed by both the regulations in effect at the time of the sale and the proposed regulations promulgated prior to the sale.

Earl M. Cranston, 115 IBLA 230 (July 12, 1990)



OIL AND GAS LEASES--Continued

GENERALLY--Continued

Assignment of a Federal oil and gas lease remains ineffective to release a record titleholder of the lease from ultimate responsibility to plug or produce a well on leased land until such assignment is approved by the Department.

Ralph G. Abbott, 115 IBLA 343 (Aug. 9, 1990)

The regulation at 43 CFR 3162.3-4(a) requires that the plugging and abandonment of an oil and gas well be conducted in accordance with a plan first approved in writing or prescribed by the authorized officer. BLM is not required to accept, as final plugging and abandonment, operations which were conducted without its approval and without an opportunity to witness and ascertain the integrity of the work.

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)

Where BLM issues a decision that gas may have been vented on a Federal oil and gas lease without prior authorization and indicates that royalty may be due for the vented gas, and where BLM issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas vented from Federal and Indian leases is subject to royalty and directing BLM to review all prior determinations to conform them to the new policy,



OIL AND GAS LEASES--Continued

GENERALLY--Continued

BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

C. C. Co., 116 IBLA 384 (Nov. 8, 1990)

ACQUIRED LANDS LEASES

An over-the-counter noncompetitive oil and gas lease offer for acquired military lands filed prior to the passage of legislation making such lands available for leasing must be rejected. However, where the lease applicant completes a new lease form, and submits it at a time when the lands are subject to leasing, BLM should treat the application as a new offer to lease, and assign the offer priority as of that date.

Caldwell Oil & Gas Co., 113 IBLA 271 (Mar. 9, 1990)

A party challenging a KGS determination by BLM has the burden of showing by a preponderance of the evidence that BLM's determination is wrong. No error is established by the fact that KGS limits conform to the boundaries of the smallest legal subdivision, surveyed tract, or lot. Lands designated within a KGS may only be leased competitively. The fact that lease proceeds serve to retire a State debt obligation for a reclamation project on the leased lands is not determinative of competitive leasing of the project lands in 1983, and is not a criterion for consideration by BLM in determining the boundaries of a KGS.

Lavaca-Navidad River Authority, State of Texas, Water Development Board, 115 IBLA 373 (Aug. 16, 1990)



OIL AND GAS LEASES--Continued

ACQUIRED LANDS LEASES--Continued

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

In accordance with 43 CFR 311.2-2(b) and (c) (1983), a noncompetitive future interest oil and gas lease offer may properly describe requested lands by the tract acquisition number assigned by the acquiring agency where the lands have not been surveyed under the rectangular survey system. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1983, the offer may include several descriptions of requested lands. An offer to lease which describes the lands sought by the tract acquisition number followed by a description taken from the acquiring deed is sufficient, even though the description contains a typographical error, provided BLM can identify the lands sought within the documents which constitute the offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)



OIL AND GAS LEASES--Continued

APPLICATIONS

Generally

One challenging a Bureau of Land Management determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Western American Exploration Co., 112 IBLA 317  
(Jan. 10, 1990)

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)



## OIL AND GAS LEASES--Continued

### APPLICATIONS--Continued

#### Generally--Continued

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

#### Attorneys-in-Fact or Agents

An oil and gas offer signed by someone other than the potential lessee, which does not disclose the relationship between the potential lessee and the signatory, and where the signatory is not authorized as an agent or attorney-in-fact of the potential lessee, is subject to rejection under 43 CFR 3102.4 and 3112.6-1.

Elaine Wolf, 113 IBLA 364 (Mar. 27, 1990)

#### Description

In accordance with 43 CFR 311.2-2(b) and (c) (1983), a noncompetitive future interest oil and gas lease offer may properly describe requested lands by the tract acquisition number assigned by the acquiring agency where the lands have not been surveyed under the rectangular survey system. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1983, the offer may include several descriptions of requested



## OIL AND GAS LEASES--Continued

### APPLICATIONS--Continued

#### Description--Continued

lands. An offer to lease which describes the lands sought by the tract acquisition number followed by a description taken from the acquiring deed is sufficient, even though the description contains a typographical error, provided BLM can identify the lands sought within the documents which constitute the offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

#### Drawings

A simultaneous oil and gas lease application is properly rejected when it does not disclose the identity of another person that holds an interest. An application is also properly rejected as a prohibited multiple filing when a person has an interest in more than one application filed for the same parcel.

"Interest in an oil and gas lease offer." When an applicant for an oil and gas lease has executed a promissory note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease, as defined by 43 CFR 3100.0-5(b).

Taylor Basin Partnership et al., 116 IBLA 23 (Aug. 27, 1990)

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management



OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Drawings--Continued

receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

Filing

An over-the-counter noncompetitive oil and gas lease offer for acquired military lands filed prior to the passage of legislation making such lands available for leasing must be rejected. However, where the lease applicant completes a new lease form, and submits it at a time when the lands are subject to leasing, BLM should treat the application as a new offer to lease, and assign the offer priority as of that date.

Caldwell Oil & Gas Co., 113 IBLA 271 (Mar. 9, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)



OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole\_Party\_in Interest

Where the record establishes that a firm filed DEC's prepared and signed by its employees, and that the employee/applicants were required by verbal agreement, as a condition of their employment, to sell their leases to parties as directed by the firm, the firm had a claim to an advantage or benefit from a lease within the meaning of 43 CFR 3100.0-5 (1978). Thus, the firm held an "interest" in its employees' DEC's, and, where that interest was not disclosed at the time the DEC's were filed as required by 43 CFR 3102.7 (1978), they should have been rejected.

Where the record fails to show that there was any enforceable agreement between a lease filing firm and nonemployees under which the nonemployees were bound to transfer any leases they acquired as directed by the firm and shows instead that the method for acquiring leases developed by the firm rested solely on the fact that the nonemployees enlisted to sign DEC's were friends and relatives of the employees or principals of the firm and, thus, could be expected to sell any subsequently acquired lease to the firm by ties of loyalty, the firm held no "interest" in the DEC's it filed on behalf of the nonemployees. Such claims of loyalty amounted merely to a hope or expectancy that a successful applicant would sell the lease to the firm.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

A simultaneous oil and gas lease application is properly rejected when it does not disclose the identity of another person that holds an interest. An application is also properly rejected as a prohibited multiple filing when a person has an interest in more than one application filed for the same parcel.

"Interest in an oil and gas lease offer." When an applicant for an oil and gas lease has executed a



OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Sole Party in Interest--Continued

promissory note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease, as defined by 43 CFR 3100.0-5(b).

Taylor Basin Partnership et al., 116 IBLA 23 (Aug. 27, 1990)

ASSIGNMENTS OR TRANSFERS

Where a partial assignment of an oil and gas lease was filed with BLM after Dec. 22, 1987, when amendments to provision of the Mineral Leasing Act controlling administration of partial assignments became effective, the partial assignment became subject to the amended law. Therefore, because the land assigned was less than the entire lease, was part of a legal subdivision, and there was no showing that approval of the partial assignment would further development of oil and gas, the partial assignment was correctly denied.

Wheeler-Lea Co., 114 IBLA 73 (Apr. 10, 1990)

Assignment of a Federal oil and gas lease remains ineffective to release a record titleholder of the lease from ultimate responsibility to plug or produce a well on leased land until such assignment is approved by the Department.

Ralph G. Abbott, 115 IBLA 343 (Aug. 9, 1990)



OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

An assignee of an oil and gas lease agrees to be bound by the terms and conditions of the lease as issued, including any stipulations consented to by the lessee as a condition of leasing. Accordingly, an appeal by an assignee of stipulations consented to by the lessee, his predecessor-in-interest, is properly denied.

Texaco Inc., 115 IBLA 369 (Aug. 15, 1990)

BLM properly denies an oil and gas lease operator's request for the suspension of the automatic elimination provisions of a unit agreement where more than 10 percent of working interest owners has not consented to the suspension at the time of the request. To determine whether there has been the necessary consent, BLM properly takes into account any assignments it has approved effective as of the date of the request, despite the operator's contention that such assignments were not effective because the parties thereto had not notified the operator at the time the request for suspension was made in accordance with the unit operating agreement.

Piute Energy Co., 116 IBLA 1 (Aug. 23, 1990)

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay the full amount of the rental due on or before the anniversary date of the lease. However, a partial assignment of record title to acreage in a Federal oil and gas lease, filed by a qualified assignee prior to the lease anniversary date, may be approved where the annual rental for the segregated acreage in the assignment was tendered prior to



## OIL AND GAS LEASES--Continued

### ASSIGNMENTS OR TRANSFERS--Continued

the anniversary date, even though the base lease terminated for nonpayment of the full lease rental on the anniversary date of the lease.

In the absence of a clear indication that it is intended for the preservation of a specific parcel or parcels, a partial payment of rental should be attributed to the leasehold generally. Such partial payment by an unapproved assignor may not be used to preserve the interests of parcels held by unapproved assignees in the absence of a clear indication that it was intended to be used to do so.

An unapproved assignor may not rely on BLM's approval of the assignment prior to the anniversary date in determining whether to submit rental for the entire leasehold. That is, where the assignor apparently submits less than full rental in the expectation that BLM would approve a pending assignment prior to the anniversary date (thereby reducing the rental due to be paid) he bears the risk that the assignment will not be approved prior to the anniversary date and that less than the full amount will be timely paid by the assignor and assignees.

Where the assignment of an oil and gas lease is pending before BLM, the assignor remains responsible for the performance of all obligations under the lease until the assignment has been approved, and BLM's failure to approve an assignment by the date the rental is due does not obviate the requirement the rental for the entire leasehold be paid on or before the anniversary date of the lease. The obligation to pay annual rental exists without regard to the fact that assignments of lease interests are pending, even though the assignments may ultimately be made effective retroactively to a date prior to the anniversary date.

Where the record titleholder of an oil and gas lease fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. BLM must refuse to



OIL AND GAS LEASES--Continued

ASSIGNMENTS OR TRANSFERS--Continued

approve any pending assignments, as there is no lease interest left to be assigned.

Interior Reserves Corp. et al., 116 IBLA 73 (Sept. 5, 1990)

The provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanding the discretion of the Bureau of Land Management to deny either partial assignments or assignments of less than 640 acres out of onshore oil and gas leases on public lands (other than those in Alaska) without a showing that the assignment will further oil and gas development, do not apply retroactively to deny an assignment to a bona fide purchaser who had acquired an interest in the oil and gas lease prior to Dec. 22, 1987, the effective date of the statute.

Lillian C. Luke, 116 IBLA 391 (Nov. 13, 1990)

A decision disapproving a pending partial assignment of an oil and gas lease will be affirmed if, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date, and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)



## OIL AND GAS LEASES--Continued

### BONA FIDE PURCHASER

The provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanding the discretion of the Bureau of Land Management to deny either partial assignments or assignments of less than 640 acres out of onshore oil and gas leases on public lands (other than those in Alaska) without a showing that the assignment will further oil and gas development, do not apply retroactively to deny an assignment to a bona fide purchaser who had acquired an interest in the oil and gas lease prior to Dec. 22, 1987, the effective date of the statute.

Lillian C. Luke, 116 IBLA 391 (Nov. 13, 1990)

### BONDS

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs decision increasing a bond for an oil and gas lease under 25 CFR 213.15(c) is to determine whether the decision is reasonable, that is, whether it is supported by law and substantial evidence.

GMG Oil & Gas Corp. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 187 (Mar. 7, 1990)

K. D. McPhail, dba Macro Oil Co. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 353 (July 6, 1990)

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for



OIL AND GAS LEASES--Continued

BONDS--Continued

adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co.,  
114 IBLA 280 (May 9, 1990)

CANCELLATION

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law or regulation because of the inadvertence of his subordinates. Where an oil and gas lease offer should have been rejected because it failed to comply with applicable regulations, a lease based on such an offer is properly cancelled.

Elaine Wolf, 113 IBLA 364 (Mar. 27, 1990)

Under 43 CFR 3108.3 (1987), BLM lacks the power to administratively cancel any oil and gas lease or interest therein that is in production.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. When a lease has been issued in violation of the terms of a regulation promulgated pursuant to statutory authority to the prejudice of the rights of others, it is properly cancelled.

Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when and if the selection is tentatively approved. Where



## OIL AND GAS LEASES--Continued

### CANCELLATION--Continued

an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

Weston B. Andrews, 116 IBLA 41 (Aug. 28, 1990)

### CIVIL ASSESSMENTS AND PENALTIES

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Drilling a gas well on Federal lands without obtaining the prior approval of the Bureau of Land Management is a violation of 43 CFR 3162.3-1(c), and under 43 CFR 3163.1(b)(2), the Bureau is required to impose an assessment of \$500 for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed \$5,000.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)



OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

Where an operator initiates drilling operations at 7 a.m. but his application for permit to drill is not approved by BLM until 4:20 p.m. the same day, BLM properly issues a notice of noncompliance for drilling without approval for a portion of 1 day, pursuant to 43 CFR 3163.1.

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Where a minimum assessment of \$500 per day is mandated for drilling without approval under 43 CFR 3163.1(b)(2), BLM is not barred from correcting an incident of noncompliance to make an assessment of \$500 for a violation, representing the portion of 1 day that the violation existed.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)



OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

Under 43 CFR 3163.1(b)(2) (1987), BLM shall impose an immediate assessment when an oil and gas lessee causes a surface disturbance preliminary thereto without obtaining prior BLM approval. The amount of the assessment, prescribed in the regulation, shall be \$500 for each day that the violation exists, including the days the violation existed prior to its discovery, not to exceed \$5,000.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

It is proper for BLM to issue a written order directing clean up of oil-contaminated soil from a well site. It may also assess the operator \$250 pursuant to 43 CFR 3163.1(a)(2) for failure to comply with that written order.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

As owner of the land and minerals, the Federal Government has an interest in being paid royalties based on accurate measurements. The regulation at 43 CFR 3162.7-3 contemplates that "the authorized officer" will issue orders and notices setting forth the methods and procedures for measuring gas production. The standards established by the American Gas Ass'n Gas Measurement Committee are well recognized and are a reliable source from which to draw Federal requirements as to the method for accurately measuring gas for the purpose of Federal royalty payments.

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a



## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

Two applications for attorney's fees and expenses filed with the Board under the Equal Access to Justice Act, 5 U.S.C. § 504 (West Supp. 1990), one for services rendered in connection with an appeal of a BLM decision which was dismissed by the Board as premature, and the other in connection with a BLM decision which was withdrawn by BLM, are both properly denied because no adversary adjudication has occurred and the Office of Hearing and Appeals has not conducted an adjudication.

Rife Oil Properties, Inc., 116 IBLA 18 (Aug. 24, 1990)

Assessments for late reporting of royalty on production pursuant to the regulation at 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719 (1982), and are not subject to the procedures required by that section.

An assessment of \$10 per report for the late reporting of royalty on production pursuant to 30 CFR 218.40 will be affirmed where 30 CFR 210.52 requires the filing of a completed Form MMS-2014 by the end of the



OIL AND GAS LEASES--Continued

CIVIL ASSESSMENTS AND PENALTIES--Continued

month following the production month and it appears from the record that the reports were filed late.

Phillips Petroleum Co., 116 IBLA 152 (Sept. 24, 1990)

COMPENSATORY ROYALTY

Decisions requiring payment of compensatory royalty for drainage from Indian oil and gas leases are affirmed on appeal where no error is shown to exist in parameters used to calculate drainage from a well on an adjacent lease.

Decisions requiring an Indian oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well on another Federal lease are ordered set aside where royalty was assessed from the effective date of lease issuance rather than from a reasonable time following lease issuance within which a prudent operator would drill a protective well under all relevant circumstances.

A Federal oil and gas lessee alleged to be draining Indian land who subsequently leased that same Indian land had no obligation to drill a protective well prior to issuance of the Indian leases.

Jerome P. McHugh & Assocs., 113 IBLA 341 (Mar. 21, 1990)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon



## OIL AND GAS LEASES--Continued

### COMPENSATORY ROYALTY--Continued

first production from its offending well. This bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by drilling a well. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

An oil and gas lessee is generally required to take such actions as would be prudent to protect his lessor from unnecessary losses due to drainage. The scope of this responsibility is not limited to drilling an offset well, but embraces all other actions a prudent operator might consider. Thus, if a prudent operator would unitize, it follows that a failure to do so would constitute a breach of the duty to protect the lessor from unnecessary loss due to drainage.

The concept of a duty to unitize is thoroughly compatible with the prudent operator standard governing a lessee's conduct and the viability of unitization is a factor to be considered when determining whether a



OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

lessee has discharged his duty to protect the leased premises from drainage. However, the lessee may always demonstrate that a prudent operator would not have formed a unit, that the lessee had unsuccessfully attempted to establish a unit, or that the costs of unitization would not leave him a profit.

When an offset well would not now be, and never would have been, profitable there is no legally defensible basis for requiring unitization. To require unitization in such cases ignores economics and simple practicalities. Quite apart from any theoretical difficulties in justifying unitization, the unitization of a producing property with a property that could not profitably be produced is virtually impossible. The operating and nonoperating interest owners of the producing property have no practical or economic reason for consenting to such unitization.

NGC Energy Co., Mono Power Co., 114 IBLA 141 (Apr. 19, 1990) 97 I.D. 159

When the same party is the operator of both the Federal tract being drained and the offspring well, BLM need not prove as a part of its cause of action that a protective well would be economic. In such cases the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

Compensatory royalties commence upon passage of a reasonable time following the date the lessee knew or should have known that drainage is occurring. The common operator who drills the offending well is in the best position to know that drainage is occurring. In such case, BLM need not assume the initial burden of showing that the common operator knew or that a reasonably prudent operator should have known that drainage was occurring. The common operator is presumed to have knowledge of drainage upon first production from its offending well. This presumption is rebuttable by the



OIL AND GAS LEASES--Continued

COMPENSATORY ROYALTY--Continued

common operator, who bears the ultimate burden of persuasion as to the notice of drainage.

Petroleum, Inc., Pennzoil Co., 115 IBLA 188 (July 3, 1990)

COMPETITIVE LEASES

A company check for oil and gas lease bid deposit is not an acceptable form of remittance under 43 CFR 3120.4-1 (1987), which requires remittances to be submitted in the form specified in the competitive sale notice, where that notice requires bidders to submit a bid deposit "by guaranteed remittance, i.e., cash, cashier's check, or money order."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show the lack of a rational basis for the decision, or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Hanna Oil & Gas Co., 113 IBLA 76 (Feb. 9, 1990)



## OIL AND GAS LEASES--Continued

### COMPETITIVE LEASES--Continued

Payment of the balance of the bonus bid at a competitive lease sale is properly construed as timely where payment is received by BLM on the seventh working day after the lease sale within the time allowed by both the regulations in effect at the time of the sale and the proposed regulations promulgated prior to the sale.

Earl M. Cranston, 115 IBLA 230 (July 12, 1990)

### DESCRIPTION OF LAND

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

In accordance with 43 CFR 311.2-2(b) and (c) (1983), a noncompetitive future interest oil and gas lease offer may properly describe requested lands by the tract acquisition number assigned by the acquiring agency where the lands have not been surveyed under the rectangular survey system. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1983, the offer may include several descriptions of requested lands. An offer to lease which describes the lands sought by the tract acquisition number followed by a



## OIL AND GAS LEASES--Continued

### DESCRIPTION OF LAND--Continued

description taken from the acquiring deed is sufficient, even though the description contains a typographical error, provided BLM can identify the lands sought within the documents which constitute the offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

### DISCRETION TO LEASE

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show the lack of a rational basis for the decision, or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Hanna Oil & Gas Co., 113 IBLA 76 (Feb. 9, 1990)

### DRAINAGE

Decisions requiring payment of compensatory royalty for drainage from Indian oil and gas leases are affirmed on appeal where no error is shown to exist in parameters used to calculate drainage from a well on an adjacent lease.

Decisions requiring an Indian oil and gas lessee to pay compensatory royalty for drainage resulting from



OIL AND GAS LEASES--Continued

DRAINAGE--Continued

an adjacent well on another Federal lease are ordered set aside where royalty was assessed from the effective date of lease issuance rather than from a reasonable time following lease issuance within which a prudent operator would drill a protective well under all relevant circumstances.

A Federal oil and gas lessee alleged to be draining Indian land who subsequently leased that same Indian land had no obligation to drill a protective well prior to issuance of the Indian leases.

Jerome P. McHugh & Assocs., 113 IBLA 341 (Mar. 21, 1990)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This bears the ultimate burden of persuasion as to the date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but



## OIL AND GAS LEASES--Continued

### DRAINAGE--Continued

need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by drilling a well. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

An oil and gas lessee is generally required to take such actions as would be prudent to protect his lessor from unnecessary losses due to drainage. The scope of this responsibility is not limited to drilling an offset well, but embraces all other actions a prudent operator might consider. Thus, if a prudent operator would unitize, it follows that a failure to do so would constitute a breach of the duty to protect the lessor from unnecessary loss due to drainage.

The concept of a duty to unitize is thoroughly compatible with the prudent operator standard governing a lessee's conduct and the viability of unitization is a factor to be considered when determining whether a lessee has discharged his duty to protect the leased premises from drainage. However, the lessee may always demonstrate that a prudent operator would not have formed a unit, that the lessee had unsuccessfully attempted to establish a unit, or that the costs of unitization would not leave him a profit.

When an offset well would not now be, and never would have been, profitable there is no legally defensible basis for requiring unitization. To require unitization in such cases ignores economics and simple practicalities. Quite apart from any theoretical difficulties in justifying unitization, the unitization of a producing property with a property that could not



OIL AND GAS LEASES--Continued

DRAINAGE--Continued

profitably be produced is virtually impossible. The operating and nonoperating interest owners of the producing property have no practical or economic reason for consenting to such unitization.

NGC Energy Co., Mono Power Co., 114 IBLA 141 (Apr. 19, 1990) 97 I.D. 159

When the same party is the operator of both the Federal tract being drained and the offspring well, BLM need not prove as a part of its cause of action that a protective well would be economic. In such cases the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

Compensatory royalties commence upon passage of a reasonable time following the date the lessee knew or should have known that drainage is occurring. The common operator who drills the offending well is in the best position to know that drainage is occurring. In such case, BLM need not assume the initial burden of showing that the common operator knew or that a reasonably prudent operator should have known that drainage was occurring. The common operator is presumed to have knowledge of drainage upon first production from its offending well. This presumption is rebuttable by the common operator, who bears the ultimate burden of persuasion as to the notice of drainage.

Petroleum, Inc., Pennzoil Co., 115 IBLA 188 (July 3, 1990)



## OIL AND GAS LEASES--Continued

### DRILLING

A Record of Decision and Finding of No Significant Impact based on an environmental record of review or an environmental assessment prepared in response to the filing of an application for a permit to drill under 43 CFR 3162.3-1 is first subject to administrative review by a State Director of BLM in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director may appeal that decision to the Interior Board of Land Appeals.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress, 114 IBLA 366 (May 24, 1990)

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD normally triggers the requirement for an environmental impact statement, unless an environmental impact statement has already been prepared which analyzes the



OIL AND GAS LEASES--Continued

DRILLING--Continued

impacts that can be expected from full-field development.

Michael Gold (On Reconsideration), 115 IBLA 218  
(July 12, 1990)

25 CFR 226.33 prohibits drilling within 300 feet of the boundary of an Osage oil and gas lease without the written permission of the Osage Agency Superintendent.

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 444 (Sept. 21, 1990)

EXPIRATION

A decision holding an oil and gas lease to have expired at the end of its extended term will be affirmed in the absence of a well capable of producing oil or gas in paying quantities. Where a well on the leasehold has been found not capable of production in paying quantities as of the end of the primary term of the lease in a prior decision affirmed by the Board on appeal, a subsequent decision on remand finding the lease to have expired at the end of its extended term will be affirmed in the absence of evidence of further development of the well during the extended term of the lease.

Jim's Water Service, Inc., 114 IBLA 1 (Mar. 29, 1990)



## OIL AND GAS LEASES--Continued

### EXTENSIONS

A decision holding an oil and gas lease to have expired at the end of its extended term will be affirmed in the absence of a well capable of producing oil or gas in paying quantities. Where a well on the leasehold has been found not capable of production in paying quantities as of the end of the primary term of the lease in a prior decision affirmed by the Board on appeal, a subsequent decision on remand finding the lease to have expired at the end of its extended term will be affirmed in the absence of evidence of further development of the well during the extended term of the lease.

Jim's Water Service, Inc., 114 IBLA 1 (Mar. 29, 1990)

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

Great Plains Petroleum, Inc., 117 IBLA 130 (Dec. 3, 1990)

### FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987

The provisions of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 expanding the discretion of the Bureau of Land Management to deny either partial assignments or assignments of less than 640 acres out of onshore oil and gas leases on public lands (other than those in Alaska) without a showing that the assignment will further oil and gas development, do not apply retroactively to deny an assignment to a bona



## OIL AND GAS LEASES--Continued

### FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987--Continued

fide purchaser who had acquired an interest in the oil and gas lease prior to Dec. 22, 1987, the effective date of the statute.

Lillian C. Luke, 116 IBLA 391 (Nov. 13, 1990)

### FIRST-QUALIFIED APPLICANT

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

### FUTURE AND FRACTIONAL INTEREST LEASES

Where an oil and gas lease has issued for the fractional mineral interest belonging to the United States in a certain tract of land and, subsequently, title to the remaining fractional interest vests in the United States, a decision rejecting a noncompetitive fractional interest lease offer for lands already



OIL AND GAS LEASES--Continued

FUTURE AND FRACTIONAL INTEREST LEASES--Continued

subject to a Federal oil and gas lease is properly affirmed.

Bernard Silver, 116 IBLA 341 (Oct. 29, 1990)

INCIDENTS OF NONCOMPLIANCE

To sustain an assessment for failure to file documents required by an order issued by an Area Manager, evidence must appear in the record to support the finding of noncompliance. Where the record is unclear as to what documents were required or whether documents filed were inadequate, the record is insufficient to support assessment of a civil penalty for noncompliance with the order.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Where an operator initiates drilling operations at 7 a.m. but his application for permit to drill is not approved by BLM until 4:20 p.m. the same day, BLM properly issues a notice of noncompliance for drilling without approval for a portion of 1 day, pursuant to 43 CFR 3163.1.

Verbal permission to drill from a BLM employee prior to approval by BLM of an application for permit to drill, even if established in the record, would not provide a defense to the issuance of an incident of noncompliance for drilling without approval, where such verbal permission is contrary to controlling Departmental regulations, knowledge of which is limited to the operator.

Where a minimum assessment of \$500 per day is mandated for drilling without approval under 43 CFR 3163.1(b)(2), BLM is not barred from correcting an incident of noncompliance to make an assessment of \$500



OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

for a violation, representing the portion of 1 day that the violation existed.

Jack J. Grynberg dba Grynberg Petroleum Co., 114 IBLA 225 (Apr. 26, 1990)

It is proper for BLM to issue a written order directing clean up of oil-contaminated soil from a well site. It may also assess the operator \$250 pursuant to 43 CFR 3163.1(a)(2) for failure to comply with that written order.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

As owner of the land and minerals, the Federal Government has an interest in being paid royalties based on accurate measurements. The regulation at 43 CFR 3162.7-3 contemplates that "the authorized officer" will issue orders and notices setting forth the methods and procedures for measuring gas production. The standards established by the American Gas Ass'n Gas Measurement Committee are well recognized and are a reliable source from which to draw Federal requirements as to the method for accurately measuring gas for the purpose of Federal royalty payments.

BLM may use the American Gas Ass'n Gas Measurement Committee standards as the source for establishing a requirement as to the proper measurement of production, but a lessee is not in violation of that requirement until BLM has decided to impose it, has notified the lessee, and has given an opportunity to comply.

The regulations at 43 CFR 3162.1(a) and 43 CFR 3161.2 reflect BLM's broad authority to issue orders governing operations at lease sites. Challenges to the scope of BLM's authority and the manner in which it is exercised are properly raised by a party adversely affected by appeal to the Board of Land



OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

Appeals, after administrative review by the State Director.

Luff Exploration Co., 115 IBLA 134 (June 28, 1990)

KNOWN GEOLOGIC STRUCTURE

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within a known geologic structure, the lessee is required to pay increased rental of \$2 per acre for the entire lease.

One challenging a Bureau of Land Management determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Western American Exploration Co., 112 IBLA 317 (Jan. 10, 1990)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). When BLM determines lands lie within such a structure before issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Excelsior Exploration Corp., 113 IBLA 177 (Feb. 14, 1990)



## OIL AND GAS LEASES--Continued

### KNOWN GEOLOGIC STRUCTURE--Continued

An appellant who challenges a determination by BLM that land is within the KGS of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. An appellant must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. Absent such a showing, the determination will not be disturbed on appeal.

Paul T. Walton, 114 IBLA 194 (Apr. 24, 1990)

A party challenging a KGS determination by BLM has the burden of showing by a preponderance of the evidence that BLM's determination is wrong. No error is established by the fact that KGS limits conform to the boundaries of the smallest legal subdivision, surveyed tract, or lot. Lands designated within a KGS may only be leased competitively. The fact that lease proceeds serve to retire a State debt obligation for a reclamation project on the leased lands is not determinative of competitive leasing of the project lands in 1983, and is not a criterion for consideration by BLM in determining the boundaries of a KGS.

Lavaca-Navidad River Authority, State of Texas, Water Development Board, 115 IBLA 373 (Aug. 16, 1990)

### LANDS SUBJECT TO

An over-the-counter noncompetitive oil and gas lease offer for acquired military lands filed prior to the passage of legislation making such lands available for leasing must be rejected. However, where the lease applicant completes a new lease form, and submits it at a time when the lands are subject to leasing, BLM



OIL AND GAS LEASES--Continued

LANDS SUBJECT TO--Continued

should treat the application as a new offer to lease, and assign the offer priority as of that date.

Caldwell Oil & Gas Co., 113 IBLA 271 (Mar. 9, 1990)

Noncompetitive oil and gas lease offers filed prior to Nov. 14, 1983, for any lands which are part of a unit of the National Wildlife Refuge System outside of Alaska may not be adjudicated pending promulgation of regulations explicitly authorizing the leasing of such lands, a hearing on such regulatory revisions, and preparation of an environmental impact statement as required by the terms of P.L. 98-151, § 137, 97 Stat. 964, 981 (1983). Such offers are properly suspended pending compliance with the statutory requirements.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when and if the selection is tentatively approved. Where an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

Weston B. Andrews, 116 IBLA 41 (Aug. 28, 1990)



## OIL AND GAS LEASES--Continued

### NONCOMPETITIVE LEASES

One challenging a Bureau of Land Management determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Western American Exploration Co., 112 IBLA 317  
(Jan. 10, 1990)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). When BLM determines lands lie within such a structure before issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Excelsior Exploration Corp., 113 IBLA 177 (Feb. 14, 1990)

An appellant who challenges a determination by BLM that land is within the KGS of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. An appellant must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. Absent such a showing, the determination will not be disturbed on appeal.

Paul T. Walton, 114 IBLA 194 (Apr. 24, 1990)



OIL AND GAS LEASES--Continued

NONCOMPETITIVE LEASES--Continued

The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)



## OIL AND GAS LEASES--Continued

### OFFERS TO LEASE

An oil and gas offer signed by someone other than the potential lessee, which does not disclose the relationship between the potential lessee and the signatory, and where the signatory is not authorized as an agent or attorney-in-fact of the potential lessee, is subject to rejection under 43 CFR 3102.4 and 3112.6-1.

Elaine Wolf, 113 IBLA 364 (Mar. 27, 1990)

An appellant who challenges a determination by BLM that land is within the KGS of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. An appellant must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. Absent such a showing, the determination will not be disturbed on appeal.

Paul T. Walton, 114 IBLA 194 (Apr. 24, 1990)

The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)



## OIL AND GAS LEASES--Continued

### OFFERS TO LEASE--Continued

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)

When no acceptable bids are received at an oral auction of oil and gas leases the first-qualified person making application for the lease within 2 years from the date of the competitive sale is generally entitled to a lease. It is well within the scope of the discretionary authority granted to the Department to hold a drawing to establish the priority of the various applications if the Bureau of Land Management receives more than one application for the same tract on the same day.

Don D. Armentrout, 117 IBLA 1 (Nov. 16, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late



## OIL AND GAS LEASES--Continued

### OFFERS TO LEASE--Continued

payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

### OVERRIDING ROYALTIES

Under 43 CFR 3108.3 (1987), BLM lacks the power to administratively cancel any oil and gas lease or interest therein that is in production.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

### PRODUCTION

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to gas produced from private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to measure all gas produced and submit monthly production reports for production from such leases under 43 CFR 3162.7-3 and 3162.4-3(d), respectively, to aid BLM in accounting for royalties due for the Federal and/or Indian leases.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)



OIL AND GAS LEASES--Continued

REINSTATEMENT

A decision denying a petition for reinstatement of a noncompetitive oil and gas lease filed pursuant to 30 U.S.C. § 188(c) (1982), will be reversed on appeal where appellant has established that she was ill at the time the payment was due, and that such illness was the proximate cause of the late payment.

Sandra Lewis, 113 IBLA 174 (Feb. 14, 1990)

For class II reinstatement, the lessee must tender the back rental and royalty at the increased rates accruing from the date of termination, together with a petition for reinstatement within 60 days from the date of receipt of the Notice of Termination. Submission of back rental that is deficient may only be cured during the 60-day period allowed for filing for reinstatement.

William F. Corkran, 114 IBLA 76 (Apr. 10, 1990)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of a lease on which there is no well capable of producing oil and gas in paying quantities, the lease automatically terminates by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the lessee can show that the failure to timely pay was either not due to a lack of reasonable diligence or was justifiable.

An unsigned check is not a negotiable instrument pursuant to the Uniform Commercial Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check



OIL AND GAS LEASES--Continued

REINSTATEMENT--Continued

since, by definition, such an unsigned check is not a negotiable instrument.

Burton/Hawks, Inc., 115 IBLA 143 (June 28, 1990)

Where the record titleholder of an oil and gas lease fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. BLM must refuse to approve any pending assignments, as there is no lease interest left to be assigned.

Interior Reserves Corp. et al., 116 IBLA 73 (Sept. 5, 1990)

BLM has no authority to grant Class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1988), if the rental amount is not submitted within 20 days after the anniversary date.

Cashing a late rental check for an oil and gas lease and depositing the funds in an unearned account does not constitute acceptance of rental payment or reinstate a terminated oil and gas lease.

Class II reinstatement under 30 U.S.C. § 188(d) (1988), is expressly limited to oil and gas leases "issued pursuant to section 226(b) or (c) of this title." There is no authority under sec. 188(d) to reinstate terminated 20-year or renewal leases issued pursuant to 30 U.S.C. § 223 (1988).

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)



OIL AND GAS LEASES--Continued

RENTALS

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within a known geologic structure, the lessee is required to pay increased rental of \$2 per acre for the entire lease.

Western American Exploration Co., 112 IBLA 317  
(Jan. 10, 1990)

Where, as a result of a court-ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

Union Oil Co. of California, 116 IBLA 67 (Sept. 5, 1990)

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay the full amount of the rental due on or before the anniversary date of the lease. However, a partial assignment of record title to acreage in a Federal oil and gas lease, filed by a qualified assignee prior to the lease anniversary date, may be approved where the annual rental for the segregated acreage in the assignment was tendered prior to



## OIL AND GAS LEASES--Continued

### RENTALS--Continued

the anniversary date, even though the base lease terminated for nonpayment of the full lease rental on the anniversary date of the lease.

In the absence of a clear indication that it is intended for the preservation of a specific parcel or parcels, a partial payment of rental should be attributed to the leasehold generally. Such partial payment by an unapproved assignor may not be used to preserve the interests of parcels held by unapproved assignees in the absence of a clear indication that it was intended to be used to do so.

An unapproved assignor may not rely on BLM's approval of the assignment prior to the anniversary date in determining whether to submit rental for the entire leasehold. That is, where the assignor apparently submits less than full rental in the expectation that BLM would approve a pending assignment prior to the anniversary date (thereby reducing the rental due to be paid) he bears the risk that the assignment will not be approved prior to the anniversary date and that less than the full amount will be timely paid by the assignor and assignees.

Where the assignment of an oil and gas lease is pending before BLM, the assignor remains responsible for the performance of all obligations under the lease until the assignment has been approved, and BLM's failure to approve an assignment by the date the rental is due does not obviate the requirement the rental for the entire leasehold be paid on or before the anniversary date of the lease. The obligation to pay annual rental exists without regard to the fact that assignments of lease interests are pending, even though the assignments may ultimately be made effective retroactively to a date prior to the anniversary date.

Interior Reserves Corp. et al., 116 IBLA 73 (Sept. 5, 1990)



OIL AND GAS LEASES--Continued

RENTALS--Continued

Under 30 U.S.C. § 188(b) (1988), termination of a lease having no well capable of producing oil or gas in paying quantities occurs automatically if the rental is not received on or before the anniversary date of the lease. Termination does not depend on or result from administrative action.

The provisions of 30 U.S.C. § 188(b) (1988), automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease became applicable to 20-year or renewal leases upon the first renewal after July 29, 1954, either by force of law or by the lessee's execution of a renewal lease containing an automatic termination provision.

Cashing a late rental check for an oil and gas lease and depositing the funds in an unearned account does not constitute acceptance of rental payment or reinstate a terminated oil and gas lease.

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)

It was error to apply sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1988), to diminish the amount of rental refund for rentals paid for periods of lease suspension. In accordance with 30 CFR 218.154(c) (1987), MMS must credit advance rentals paid for the period of time operations were suspended against rental accruing after termination of the suspension.

Tenneco Oil Co., 117 IBLA 120 (Dec. 3, 1990)

Shell Offshore, Inc., 117 IBLA 125 (Dec. 3, 1990)



## OIL AND GAS LEASES--Continued

### ROYALTIES

#### Generally

It is within the authority of the Department to interpret its own regulations, and its interpretation should be given great deference. Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, when it appears from the record that: (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for oil produced and removed from the lease; (2) the Department had accepted lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively.

Sun Exploration & Production Co., 112 IBLA 373  
(Jan. 19, 1990) 97 I.D. 1

MMS unfairly discriminates against a CO2 lessee in denying a deduction for that component of a pipeline tariff relating to Federal and state income taxes solely on the basis that such lessee is an affiliate of the pipeline operator.

Shell Western E & P, Inc., 112 IBLA 394 (Jan. 23, 1990)



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting gas sold was not priced in accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the revised valuation and afforded an opportunity to respond as required by the lease terms.

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)

97 I.D. 11

In calculating the additional royalty owed under sec. 6(a)(9) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335(a)(9), the Department must use the tax rates in effect in Texas and Louisiana on Aug. 7, 1953.

"Additional Royalty" under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act, M-36968 (Aug. 31, 1989)

97 I.D. 49



## OIL AND GAS LEASES--Continued

### ROYALTIES--Continued

#### Generally--Continued

When the purchaser of natural gas produced from Federal leases reimburses the lessee for severance taxes and ad valorem taxes pursuant to a contract for purchase and sale of the natural gas, the gross proceeds received from the leases by the lessee should include the tax reimbursements. Accordingly, it is proper for MMS to demand additional royalties when the royalty payments were based on a gross proceeds determination that excluded the severance tax reimbursements.

CIG Exploration, Inc., 113 IBLA 99 (Feb. 14, 1990)

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

A royalty valuation letter issued by Geological Survey specifically addressing royalty computation for gas delivered under a particular contract from a specific Outer Continental Shelf oil and gas lease committed to a unit does not establish the royalty base for gas production for a well subsequently completed on the lease in a non-unitized formation.

Where Geological Survey issues a royalty valuation letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, but the gas has in fact been decontrolled, the letter provides no basis for the computation of the amount of royalty due the United States.

Where a company's gas production from a well on an Outer Continental Shelf oil and gas lease has been valued by MMS on the basis of the highest prices paid for like-quality gas produced from other wells on the same lease, an assertion by that company that it has been treated unfairly because its gas production from the well has been valued differently than another company's production from the same well during the same period will be rejected based on MMS' explanation that it had not audited the royalty payments of the second company.

Amoco Production Co., 114 IBLA 42 (Apr. 3, 1990)



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

Ordinarily royalty is computed on the value of the gas removed or sold from the lease. Where gas must be transported from the field to the point of first sale, the deduction of reasonable transportation costs is allowed. The Secretary of the Interior's authority to determine the value of production upon which royalty payments are made extends to determining the factors used in computing transportation allowances for royalty purposes.

Operating leases are a proper component of a transportation allowance for a CO2 pipeline which is required to transport production to market. A decision limiting operating costs to 10 percent of undepreciated investment when calculating the relevant transportation allowance may be set aside and remanded where the effect is to eliminate a substantial percentage of operating costs and no rational basis for such a limitation is given in the decision or contained in the record.

The allowance of a reasonable rate of return on depreciated assets has been upheld in computing a transportation allowance for production for which there is no market in the field or at the wellhead. Application of a rate of return based on the prime interest rate at the time of the initial period for which the



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

transportation allowance is calculated will be upheld as reasonable.

Mobil Producing Texas & New Mexico, Inc., 115 IBLA 164 (June 28, 1990)

When computing the royalties for offshore oil and gas, the Minerals Management Service allows a transportation allowance for costs reasonably incurred in moving oil and gas from the point of offshore production to the first available market onshore. A transportation allowance may not be taken for the costs of storage, handling, and accounting incurred because it is necessary to accumulate sufficient condensate to meet a minimum volume required for delivery, as those costs are related to marketing the product, i.e., to accumulating a marketable quantity of the product.

TXP Operating Co., 115 IBLA 195 (July 3, 1990)

Farm tap gas, which is gas provided free to a royalty owner for structures on the land covered by such owner's oil and gas lease, is subject to royalty under 30 CFR 202.102 (1987).

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

The regulated ceiling price of gas under the Natural Gas Policy Act (NGPA) is a relevant factor in determining the value of the gas for royalty purposes. Where an assessment of additional royalty after audit is based on a failure of the producer to file a timely application for classification of the gas under sec. 102 of the NGPA (allowing a higher ceiling price), and where the record discloses an issue of material fact concerning whether the producer knew or should have



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

known the gas would qualify for a higher ceiling price at an earlier time, the case is properly referred for an evidentiary hearing.

Mobil Oil Corp., 115 IBLA 304 (Aug. 7, 1990)

Oil and gas lease royalty accounts are settled under rules in effect at the time charges at issue were incurred.

Where a 1987 audit discovered a discrepancy between sales and production volumes from an oil and gas lease had occurred in March 1985, MMS properly required the royalty rate to be calculated on actual production pursuant to the provision of 30 CFR 202.101 (1984).

An obligation to pay oil royalty for March 1985 using actual production to compute a royalty rate pursuant to 30 CFR 202.101 (1984) did not arise until 1987 when MMS ordered such payment to be made following an audit of the 1985 account.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

A party challenging a determination as to the value of gas or other hydrocarbons produced from a Federal lease must establish that the methodology used is in fact erroneous. An appellant who alleges that because of market forces contract prices lag behind spot market prices has not established the MMS practice of using the higher of the two prices (*i.e.*, the greater of proceeds or the spot market price) is an erroneous methodology where the relevant regulation authorizes the use of posted prices to value production, but requires that the value shall never be less than the gross proceeds.

Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, an exception exists when certain conditions are met. If (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for products removed from the lease; (2) the Department had accepted the lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

accounting procedure should be applied prospectively only.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

Although royalty underpayments are improper by definition and may, under some circumstances, subject the payor to civil and/or criminal penalties, the issue in the context of a royalty audit is what, if any, additional royalty is due and owing to the lessor. Where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit regardless of the fact that the underpayments were intended to recoup the prior overpayments.

Forest Oil Corp. (On Reconsideration), 116 IBLA 176 (Sept. 26, 1990) 97 I.D. 239

Where natural gas produced from a Federal lease is sold under an arrangement where the buyer pays the maximum lawful price allowed under the Natural Gas Policy Act of 1978 and also reimburses the producer for severance taxes it paid to the State of Montana, both the maximum Natural Gas Policy Act price and the severance tax reimbursement together constitute "gross proceeds" received for the gas from the lease. The Minerals Management Service properly includes such severance tax reimbursements when computing the value of gas for royalty purposes.

Miami Oil Producers, Inc., 116 IBLA 345 (Oct. 30, 1990)



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

Where BLM issues a decision that gas may have been vented on a Federal oil and gas lease without prior authorization and indicates that royalty may be due for the vented gas, and where BLM issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas vented from Federal and Indian leases is subject to royalty and directing BLM to review all prior determinations to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

C. C. Co., 116 IBLA 384 (Nov. 8, 1990)

MMS is required by law to assess interest charges on late royalty payments for oil and gas leasees which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its earlier decision and affirm the MMS order assessing late payment charges.

Dugan Production Corp. (On Reconsideration), 117 IBLA 153 (Dec. 13, 1990)

The Outer Continental Shelf Lands Act requires that royalties be paid on the amount or value of the production saved, removed, or sold and requires the Secretary to conduct the leasing program so as to assure receipt of fair market value. The Secretary has authority to determine the value of production upon which royalty payments are made.

When an oil and gas lessee has sold its natural gas and paid royalty thereon based on the price



## OIL AND GAS LEASES--Continued

### ROYALTIES--Continued

#### Generally--Continued

specified by sec. 104 of the Natural Gas Policy Act, 15 U.S.C. § 3314 (1988), and MMS subsequently assesses additional royalty based on the lessee's alleged failure to file a timely application for classification of the gas under sec. 102 of the Natural Gas Policy Act, 15 U.S.C. § 3312 (1988), which would have allowed a higher ceiling price, the issue is whether the lessee breached its duty to market the gas by failing to seek classification of the gas at an earlier time and the Board may refer the case for an evidentiary hearing on that issue.

A Federal oil and gas lease does not require notice and an opportunity to be heard prior to a decision to assess royalties based on a value of production which is higher than the price received by the lessee. The Department is not bound by the price reported by a lessee and has authority to determine for royalty purposes that the value of gas produced was different than the amount received by the lessee. A lessee is entitled to a reasoned and factual explanation supporting a decision setting a different value and an opportunity to challenge it and obtain review.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

#### Interest

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

The regulations found at 43 CFR 218.102(a) and 218.150(b) provide exceptions to the assessment of late payment charges when royalty payments are made after the end of the month following the month in which the oil and gas is produced and sold. The exception applies if the payor has filed a timely and sufficient estimated payment for the applicable lease account and each product type in accordance with the instructions in the MMS Oil & Gas Payor Handbook. MMS properly assesses late payment charges when a payor has not submitted an estimated payment for a specific lease or product type, even if the total of the estimated payments attributable to the payor exceeds the total royalties due for production from all of the payor's leases.

Exxon Co., U.S.A., 115 IBLA 62 (June 14, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the



## OIL AND GAS LEASES--Continued

### ROYALTIES--Continued

#### Interest--Continued

lease level and fails to provide estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 115 IBLA 81 (June 19, 1990)

Pursuant to sec. 111 of the Federal Oil & Gas Royalty Management Act of 1982, 30 U.S.C. § 1721 (1982), MMS is authorized to assess a higher interest rate for late payment of oil and gas royalties than it had previously been authorized to assess; therefore, for time periods prior to passage of the Federal Oil and Gas Royalty Management Act of 1982, MMS may assess only the lower, previously authorized interest rate.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Interest--Continued

though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

Natural Gas Liquid Products

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

Where Government acceptance of the tender of royalties is made subject to post audit, the mere recomputation of royalty payments due to the Government to correctly reflect fair market value of NGLPs does not constitute imposition of a penalty or give rise to an issue of retroactive application of a new rule.

A lessee's allegation that its method of valuing production from oil and gas leases is as effective at determining fair market value as the method utilized by MMS is not an adequate basis for reversal of a decision assessing additional royalties.

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

A party challenging a determination as to the value of gas or other hydrocarbons produced from a Federal lease must establish that the methodology used is in fact erroneous. An appellant who alleges that because of market forces contract prices lag behind



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

spot market prices has not established the MMS practice of using the higher of the two prices (*i.e.*, the greater of proceeds or the spot market price) is an erroneous methodology where the relevant regulation authorizes the use of posted prices to value production, but requires that the value shall never be less than the gross proceeds.

Natural gas liquid products processed in Louisiana may properly be valued according to spot market prices for similar products in Texas.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where it is MMS policy to accept the Department of Energy ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market prices must be deemed arbitrary and capricious.

Where an oil and gas lessee sells natural gas liquid products pursuant to a non-arm's-length contract



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

at a price below the "yardstick" valuation as derived from the "Procedure Paper on Natural Gas Liquid Products Valuation," royalty is properly assessed at the "yardstick" valuation unless the lessee can affirmatively show that its non-arm's-length contract had characteristics similar to arm's-length contracts entered into at the same time, in the same general area, and for the same product.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

Since, pursuant to the provisions of 30 CFR 206.152(a)(2) (1987), the reasonable allowance for the costs of processing natural gas liquid products was, as a general matter, to be based on "actual plant costs," the fact that other lessees were permitted a greater allowance is a legal irrelevancy so long as each lessee's allowance is based on its actual plant costs.

Where the calculation of a processing allowance involves consideration of a profit factor based on the sales values of natural gas liquid products, and where it is necessary to provide a separate extraction and fractionation allowance, the profit factor is properly computed only once in the combined extraction/fractionation allowance computation.

Where the determination of the processing allowance to be permitted for natural gas liquid products requires the separate determination of an extraction and fractionation allowance, these two allowances are



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Natural Gas Liquid Products--Continued

properly added together to arrive at the combined processing allowance.

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time the payment was originally made.

In the absence of acceptance of a lessee's royalty valuation as conclusive by an official authorized to bind the Department on such matters, the fact that the office of Inspector General may have conducted an audit of payments made on a lessee's behalf does not prevent the duly authorized officials from thereafter timely reviewing the lessee's original valuation and determining that royalty is still owing.

Where it is MMS policy to accept DOE ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market price must be deemed arbitrary and capricious.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments

A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified MMS of acceptance of this responsibility by filing a payor information form may be held liable for royalties due under the terms of the lease.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)

97 I.D. 11

Where a Federal lessee is required to pay royalty for part of a lease on a sliding scale at a higher rate than 12-1/2 percent, the part paying at the higher rate is considered an entirety for purposes of royalty calculation, and gross production from a producing well on that portion is properly used to determine the sliding-scale royalty rate.

Conoco, Inc., 113 IBLA 47 (Jan. 30, 1990)

The offsetting of overpayments against underpayments of royalty on natural gas production from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Union Exploration Partners, Ltd., 113 IBLA 186  
(Feb. 15, 1990)



## OIL AND GAS LEASES--Continued

### ROYALTIES--Continued

#### Payments--Continued

An exception to late payment charges for royalty payments filed after the end of the month following the month in which the oil and gas is produced and sold may be recognized where the payor has filed a sufficient estimated payment in accordance with the instructions in the Payor Handbook. An estimated payment is made on Form-2014 and requires identification of the payor, the lease number, and the product code and selling arrangement number. An estimated payment may only be established initially for the month immediately preceding the month in which the report and payment are filed and, thereafter, the estimated balance is rolled over monthly to cover production and sales in succeeding months.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)

The regulations found at 43 CFR 218.102(a) and 218.150(b) provide exceptions to the assessment of late payment charges when royalty payments are made after the end of the month following the month in which the oil and gas is produced and sold. The exception applies if the payor has filed a timely and sufficient estimated payment for the applicable lease account and each product type in accordance with the instructions in the MMS Oil & Gas Payor Handbook. MMS properly assesses late payment charges when a payor has not submitted an estimated payment for a specific lease or product type, even if the total of the estimated



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments--Continued

payments attributable to the payor exceeds the total royalties due for production from all of the payor's leases.

Exxon Co., U.S.A., 115 IBLA 62 (June 14, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level and fails to provide estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 115 IBLA 81 (June 19, 1990)

Pursuant to the lease terms and the applicable regulation, 30 CFR 218.50, royalty payments are required to be made by the last day of the month following production. Late payment charges will be assessed where payments are made after the due date. However, the regulations found at 43 CFR 218.102(a) and 218.150(b) establish exceptions to late payment charges for royalty payments made after the end of the month



## OIL AND GAS LEASES--Continued

### ROYALTIES--Continued

#### Payments--Continued

following the month in which the oil and gas is produced and sold where the payor has filed estimated payments in accordance with the instructions in the MMS Oil & Gas Payor Handbook. Where a payor fails to provide estimated payments at the lease level, and fails to identify estimated payments by specific product codes on the MMS-2014 form, MMS properly assesses late payment charges. This charge is appropriate even though the total amount of all the estimated payments made by the payor for its leases exceeds the total amount of royalties due for all of the payor's leases, including those for which no estimated payment has been established.

Exxon Co., U.S.A., 117 IBLA 199 (Dec. 21, 1990)

#### Processing Allowance

Pursuant to 30 CFR 250.67(a)(2) (1978) MMS is authorized to utilize a value determined to be a reasonable allowance for the cost of processing natural gas liquid products, with a maximum of two-thirds, unless a greater allowance is in the interest of conservation. The determination is to be based upon regional plant practices, costs, and other pertinent factors.

Federal lessees are required to bear the costs of putting oil and gas into marketable condition. Expenses incurred in storage and transportation beyond the point of first potential market are properly excluded from a lessee's manufacturing allowance despite allegations that the expenses are an "integral part" of plant operations.

MMS must provide a lessee with an adequate basis for accepting or appealing a determination of the manufacturing allowance to be utilized in royalty calculation. An MMS decision must be supported by a



OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Processing Allowance--Continued

rational basis which is stated in the written decision and supported by the record.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

STIPULATIONS

An assignee of an oil and gas lease agrees to be bound by the terms and conditions of the lease as issued, including any stipulations consented to by the lessee as a condition of leasing. Accordingly, an appeal by an assignee of stipulations consented to by the lessee, his predecessor-in-interest, is properly denied.

Texaco Inc., 115 IBLA 369 (Aug. 15, 1990)

SUSPENSIONS

BLM properly denies an oil and gas lease operator's request for the suspension of the automatic elimination provisions of a unit agreement where more than 10 percent of working interest owners has not consented to the suspension at the time of the request. To determine whether there has been the necessary consent, BLM properly takes into account any assignments it has approved effective as of the date of the request, despite the operator's contention that such assignments were not effective because the parties thereto had not notified the operator at the time the request for suspension was made in accordance with the unit operating agreement.

Piute Energy Co., 116 IBLA 1 (Aug. 23, 1990)



## OIL AND GAS LEASES--Continued

### SUSPENSIONS--Continued

Where, as a result of a court-ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

Union Oil Co. of California, 116 IBLA 67 (Sept. 5, 1990)

It was error to apply sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1988), to diminish the amount of rental refund for rentals paid for periods of lease suspension. In accordance with 30 CFR 218.154(c) (1987), MMS must credit advance rentals paid for the period of time operations were suspended against rental accruing after termination of the suspension.

Tenneco Oil Co., 117 IBLA 120 (Dec. 3, 1990)

Shell Offshore, Inc., 117 IBLA 125 (Dec. 3, 1990)

### TERMINATION

A decision denying a petition for reinstatement of a noncompetitive oil and gas lease filed pursuant to 30 U.S.C. § 188(c) (1982), will be reversed on appeal where appellant has established that she was ill at the



OIL AND GAS LEASES--Continued

TERMINATION--Continued

time the payment was due, and that such illness was the proximate cause of the late payment.

Sandra Lewis, 113 IBLA 174 (Feb. 14, 1990)

For class II reinstatement, the lessee must tender the back rental and royalty at the increased rates accruing from the date of termination, together with a petition for reinstatement within 60 days from the date of receipt of the Notice of Termination. Submission of back rental that is deficient may only be cured during the 60-day period allowed for filing for reinstatement.

William F. Corkran, 114 IBLA 76 (Apr. 10, 1990)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of a lease on which there is no well capable of producing oil and gas in paying quantities, the lease automatically terminates by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the lessee can show that the failure to timely pay was either not due to a lack of reasonable diligence or was justifiable.

An unsigned check is not a negotiable instrument pursuant to the Uniform Commercial Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check since, by definition, such an unsigned check is not a negotiable instrument.

Burton/Hawks, Inc., 115 IBLA 143 (June 28, 1990)



## OIL AND GAS LEASES--Continued

### TERMINATION--Continued

A noncompetitive oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law upon failure of a lessee to pay the full amount of the rental due on or before the anniversary date of the lease. However, a partial assignment of record title to acreage in a Federal oil and gas lease, filed by a qualified assignee prior to the lease anniversary date, may be approved where the annual rental for the segregated acreage in the assignment was tendered prior to the anniversary date, even though the base lease terminated for nonpayment of the full lease rental on the anniversary date of the lease.

An unapproved assignor may not rely on BLM's approval of the assignment prior to the anniversary date in determining whether to submit rental for the entire leasehold. That is, where the assignor apparently submits less than full rental in the expectation that BLM would approve a pending assignment prior to the anniversary date (thereby reducing the rental due to be paid) he bears the risk that the assignment will not be approved prior to the anniversary date and that less than the full amount will be timely paid by the assignor and assignees.

Where the assignment of an oil and gas lease is pending before BLM, the assignor remains responsible for the performance of all obligations under the lease until the assignment has been approved, and BLM's failure to approve an assignment by the date the rental is due does not obviate the requirement the rental for the entire leasehold be paid on or before the anniversary date of the lease. The obligation to pay annual rental exists without regard to the fact that assignments of lease interests are pending, even though the assignments may ultimately be made effective retroactively to a date prior to the anniversary date.

Where the record titleholder of an oil and gas lease fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. BLM must refuse to



OIL AND GAS LEASES--Continued

TERMINATION--Continued

approve any pending assignments, as there is no lease interest left to be assigned.

Interior Reserves Corp. et al., 116 IBLA 73 (Sept. 5, 1990)

Under 30 U.S.C. § 188(b) (1988), termination of a lease having no well capable of producing oil or gas in paying quantities occurs automatically if the rental is not received on or before the anniversary date of the lease. Termination does not depend on or result from administrative action.

The provisions of 30 U.S.C. § 188(b) (1988), automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease became applicable to 20-year or renewal leases upon the first renewal after July 29, 1954, either by force of law or by the lessee's execution of a renewal lease containing an automatic termination provision.

BLM has no authority to grant Class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1988), if the rental amount is not submitted within 20 days after the anniversary date.

Cashing a late rental check for an oil and gas lease and depositing the funds in an unearned account does not constitute acceptance of rental payment or reinstate a terminated oil and gas lease.

Class II reinstatement under 30 U.S.C. § 188(d) (1988), is expressly limited to oil and gas leases "issued pursuant to section 226(b) or (c) of this title." There is no authority under sec. 188(d) to reinstate terminated 20-year or renewal leases issued pursuant to 30 U.S.C. § 223 (1988).

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)



## OIL AND GAS LEASES--Continued

### TERMINATION--Continued

A decision disapproving a pending partial assignment of an oil and gas lease will be affirmed if, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date, and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

Martin Faley, 116 IBLA 398 (Nov. 14, 1990)

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

Great Plains Petroleum, Inc., 117 IBLA 130 (Dec. 3, 1990)

### TWENTY-YEAR LEASES

The provisions of 30 U.S.C. § 188(b) (1988), automatically terminating an oil and gas lease for failure to pay the rental on or before the anniversary date of the lease became applicable to 20-year or renewal leases upon the first renewal after July 29, 1954, either by force of law or by the lessee's execution of a renewal lease containing an automatic termination provision.

Class II reinstatement under 30 U.S.C. § 188(d) (1988), is expressly limited to oil and gas leases "issued pursuant to section 226(b) or (c) of this title." There is no authority under sec. 188(d) to



OIL AND GAS LEASES--Continued

TWENTY-YEAR LEASES--Continued

reinstate terminated 20-year or renewal leases issued pursuant to 30 U.S.C. § 223 (1988).

Paul D. Lieb, Pardee Petroleum Corp., Ralph W. M. Keating, 116 IBLA 279 (Oct. 22, 1990)

UNIT AND COOPERATIVE AGREEMENTS

Where a Federal lessee is required to pay royalty for part of a lease on a sliding scale at a higher rate than 12-1/2 percent, the part paying at the higher rate is considered an entirety for purposes of royalty calculation, and gross production from a producing well on that portion is properly used to determine the sliding-scale royalty rate.

Conoco, Inc., 113 IBLA 47 (Jan. 30, 1990)

Where a unit operator seeks to have certain acreage treated as if it had been subject to a unit agreement on the basis that the lessee, the unit operator, and BLM operated on the assumption that the tract had been fully committed to the unit in 1983, BLM properly determined the tract had not been effectively committed to the unit until the necessary paperwork documenting full commitment of all working interest owners had been filed with BLM in 1986.

Woods Petroleum Corp., 113 IBLA 190 (Feb. 21, 1990)



## OIL AND GAS LEASES--Continued

### UNIT AND COOPERATIVE AGREEMENTS--Continued

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to gas produced from private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to measure all gas produced and submit monthly production reports for production from such leases under 43 CFR 3162.7-3 and 3162.4-3(d), respectively, to aid BLM in accounting for royalties due for the Federal and/or Indian leases.

Norfolk Energy Inc., 115 IBLA 265 (July 25, 1990)

BLM properly denies an oil and gas lease operator's request for the suspension of the automatic elimination provisions of a unit agreement where more than 10 percent of working interest owners has not consented to the suspension at the time of the request. To determine whether there has been the necessary consent, BLM properly takes into account any assignments it has approved effective as of the date of the request, despite the operator's contention that such assignments were not effective because the parties thereto had not notified the operator at the time the request for suspension was made in accordance with the unit operating agreement.

Piute Energy Co., 116 IBLA 1 (Aug. 23, 1990)

### WELL CAPABLE OF PRODUCTION

A decision holding an oil and gas lease to have expired at the end of its extended term will be affirmed in the absence of a well capable of producing oil or gas in paying quantities. Where a well on the leasehold has been found not capable of production in paying quantities as of the end of the primary term of the lease in a prior decision affirmed by the Board on appeal, a subsequent decision on remand finding the



OIL AND GAS LEASES--Continued

WELL CAPABLE OF PRODUCTION--Continued

lease to have expired at the end of its extended term will be affirmed in the absence of evidence of further development of the well during the extended term of the lease.

Jim's Water Service, Inc., 114 IBLA 1 (Mar. 29, 1990)

Where, following receipt of a 60-day notice from BLM that it does not regard an oil and gas lease as containing a well capable of producing hydrocarbons in paying quantities, the operator or lessee of such lease in an extended term by reason of production fails to present any evidence establishing the well's current potential production to produce the lease, the lease is properly declared to have terminated on account of the cessation of production.

Great Plains Petroleum, Inc., 117 IBLA 130 (Dec. 3, 1990)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS  
BAY GRANT LANDS

GENERALLY

A decision to proceed with a timber sale will not be disturbed on appeal where it has not been established that there was a failure to consider relevant matters of environmental concern, such as impacts on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)



OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS  
BAY GRANT LANDS--Continued

TIMBER SALES

Allowing the harvesting of timber on O&C lands does not violate the broad principle of multiple-use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production pursuant to the Act of Aug. 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

OUTER CONTINENTAL SHELF LANDS ACT  
(See also Oil & Gas Leases)

GENERALLY

The Outer Continental Shelf Lands Act requires that royalties be paid on the amount or value of the production saved, removed, or sold and requires the Secretary to conduct the leasing program so as to assure receipt of fair market value. The Secretary has authority to determine the value of production upon which royalty payments are made.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

OIL AND GAS LEASES

A royalty payor who has been assigned the duty to make royalty payments for production from an oil and gas lease on behalf of co-lessees and who has notified



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

MMS of acceptance of this responsibility by filing a payor information form may be held liable for royalties due under the terms of the lease.

A decision issued to the payor after audit regarding valuation of natural gas produced from certain leases asserting gas sold was not priced in accordance with the statutory ceiling price may be set aside and remanded where the record fails to indicate the affected lessees were apprised of the basis of the revised valuation and afforded an opportunity to respond as required by the lease terms.

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)

97 I.D. 11

In calculating the additional royalty owed under sec. 6(a)(9) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335(a)(9), the Department must use the tax rates in effect in Texas and Louisiana on Aug. 7, 1953.

"Additional Royalty" under Sec. 6(a)(9) of the Outer Continental Shelf Lands Act, M-36968 (Aug. 31, 1989)

97 I.D. 49



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

The procedural safeguards applicable to civil penalties assessed pursuant to 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments levied pursuant to 30 CFR 218.40.

The party choosing the means of delivery of a document must accept the responsibility for and bear the consequences of that choice, including the possibility of delay or nondelivery.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 113 IBLA 255 (Mar. 9, 1990)



## OUTER CONTINENTAL SHELF LANDS ACT--Continued

### OIL AND GAS LEASES--Continued

A royalty valuation letter issued by Geological Survey specifically addressing royalty computation for gas delivered under a particular contract from a specific Outer Continental Shelf oil and gas lease committed to a unit does not establish the royalty base for gas production for a well subsequently completed on the lease in a non-unitized formation.

Where Geological Survey issues a royalty valuation letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, but the gas has in fact been decontrolled, the letter provides no basis for the computation of the amount of royalty due the United States.

Where a company's gas production from a well on an Outer Continental Shelf oil and gas lease has been valued by MMS on the basis of the highest prices paid for like-quality gas produced from other wells on the same lease, an assertion by that company that it has been treated unfairly because its gas production from the well has been valued differently than another company's production from the same well during the same period will be rejected based on MMS' explanation that it had not audited the royalty payments of the second company.

Amoco Production Co., 114 IBLA 42 (Apr. 3, 1990)

When computing the royalties for offshore oil and gas, the Minerals Management Service allows a transportation allowance for costs reasonably incurred in moving oil and gas from the point of offshore production to the first available market onshore. A transportation allowance may not be taken for the costs of storage, handling, and accounting incurred because it is necessary to accumulate sufficient condensate to meet a minimum volume required for delivery, as those costs are related to marketing the product, *i.e.*, to accumulating a marketable quantity of the product.



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

TXP Operating Co., 115 IBLA 195 (July 3, 1990)

Where Government acceptance of the tender of royalties is made subject to post audit, the mere recomputation of royalty payments due to the Government to correctly reflect fair market value of NGLPs does not constitute imposition of a penalty or give rise to an issue of retroactive application of a new rule.

A lessee's allegation that its method of valuing production from oil and gas leases is as effective at determining fair market value as the method utilized by MMS is not an adequate basis for reversal of a decision assessing additional royalties.

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Shell Offshore Inc., 115 IBLA 205 (July 3, 1990)

The regulated ceiling price of gas under the Natural Gas Policy Act (NGPA) is a relevant factor in determining the value of the gas for royalty purposes. Where an assessment of additional royalty after audit is based on a failure of the producer to file a timely application for classification of the gas under sec. 102 of the NGPA (allowing a higher ceiling price), and where the record discloses an issue of material fact concerning whether the producer knew or should have known the gas would qualify for a higher ceiling price



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

at an earlier time, the case is properly referred for an evidentiary hearing.

Mobil Oil Corp., 115 IBLA 304 (Aug. 7, 1990)

An MMS decision denying a transportation allowance is properly affirmed to the extent that the allowance deducts line losses attributed to the transportation of royalty natural gas from the wellhead of an Outer Continental Shelf oil and gas lease to an offshore delivery point.

A transportation allowance deducting a percentage for "gas consumed" may be allowable as a deduction for "lease-use" gas. Where the record is insufficient to determine whether circumstances warrant a "lease-use" gas deduction, a decision by MMS summarily denying the allowance will be set aside and the case remanded to MMS for consideration of the extent to which the transportation allowance represents "lease-use" gas.

Arco Oil & Gas Co., 115 IBLA 393 (Aug. 21, 1990)

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

A party challenging a determination as to the value of gas or other hydrocarbons produced from a Federal lease must establish that the methodology used is in fact erroneous. An appellant who alleges that because of market forces contract prices lag behind spot market prices has not established the MMS practice of using the higher of the two prices (i.e., the



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

greater of proceeds or the spot market price) is an erroneous methodology where the relevant regulation authorizes the use of posted prices to value production, but requires that the value shall never be less than the gross proceeds.

Natural gas liquid products processed in Louisiana may properly be valued according to spot market prices for similar products in Texas.

Pursuant to 30 CFR 250.67(a)(2) (1978) MMS is authorized to utilize a value determined to be a reasonable allowance for the cost of processing natural gas liquid products, with a maximum of two-thirds, unless a greater allowance is in the interest of conservation. The determination is to be based upon regional plant practices, costs, and other pertinent factors.

Federal lessees are required to bear the costs of putting oil and gas into marketable condition. Expenses incurred in storage and transportation beyond the point of first potential market are properly excluded from a lessee's manufacturing allowance despite allegations that the expenses are an "integral part" of plant operations.

MMS must provide a lessee with an adequate basis for accepting or appealing a determination of the manufacturing allowance to be utilized in royalty calculation. An MMS decision must be supported by a rational basis which is stated in the written decision and supported by the record.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

Where, as a result of a court-ordered preliminary injunction and in accordance with 30 CFR 218.154(a), MMS issues an order suspending operations on an Outer Continental Shelf oil and gas lease and directs that no payment of rental will be required during the period of suspension, and the lease anniversary date falls within the period of such suspension, the subsequent termination of the suspension by MMS triggers the requirement of 30 CFR 218.154(c) that MMS compute the prorated rental due and notify the lessee thereof. In computing that prorated rental, MMS must credit advance rentals paid for the period of time operations were suspended against future rentals.

Union Oil Co. of California, 116 IBLA 67 (Sept. 5, 1990)

Although royalty underpayments are improper by definition and may, under some circumstances, subject the payor to civil and/or criminal penalties, the issue in the context of a royalty audit is what, if any, additional royalty is due and owing to the lessor. Where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit regardless of the fact that the underpayments were intended to recoup the prior overpayments.

Forest Oil Corp. (On Reconsideration), 116 IBLA 176  
(Sept. 26, 1990) 97 I.D. 239

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time that the payment was originally made.

Where it is MMS policy to accept the Department of Energy ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market prices must be deemed arbitrary and capricious.

Where an oil and gas lessee sells natural gas liquid products pursuant to a non-arm's-length contract at a price below the "yardstick" valuation as derived from the "Procedure Paper on Natural Gas Liquid Products Valuation," royalty is properly assessed at the "yardstick" valuation unless the lessee can affirmatively show that its non-arm's-length contract had characteristics similar to arm's-length contracts entered into at the same time, in the same general area, and for the same product.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

Since, pursuant to the provisions of 30 CFR 206.152(a)(2) (1987), the reasonable allowance for the costs of processing natural gas liquid products was, as a general matter, to be based on "actual plant costs," the fact that other lessees were permitted a greater allowance is a legal irrelevancy so long as each lessee's allowance is based on its actual plant costs.

Where the calculation of a processing allowance involves consideration of a profit factor based on the sales values of natural gas liquid products, and where it is necessary to provide a separate extraction and fractionation allowance, the profit factor is properly computed only once in the combined extraction/fractionation allowance computation.

Where the determination of the processing allowance to be permitted for natural gas liquid products requires the separate determination of an extraction and fractionation allowance, these two allowances are properly added together to arrive at the combined processing allowance.

The "Procedure Paper on Natural Gas Liquid Products Valuation," developed by MMS, is not a substantive regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1988).

Since, unless otherwise expressly provided, all royalty payments are accepted subject to audit, a subsequent determination that additional royalties are due does not give rise to a question of retroactive application of a new rule if the determination that a deficiency exists was made under the regulation applicable at the time the payment was originally made.

In the absence of acceptance of a lessee's royalty valuation as conclusive by an official authorized to bind the Department on such matters, the fact that the office of Inspector General may have conducted an audit of payments made on a lessee's behalf does not prevent the duly authorized officials from thereafter timely



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

reviewing the lessee's original valuation and determining that royalty is still owing.

Where it is MMS policy to accept DOE ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices in favor of the monthly average spot market price must be deemed arbitrary and capricious.

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Cities Service Oil & Gas Corp., 117 IBLA 17 (Nov 26, 1990) 97 I.D. 243

It was error to apply sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1988), to diminish the amount of rental refund for rentals paid for periods of lease suspension. In accordance with 30 CFR 218.154(c) (1987), MMS must credit advance rentals paid for the period of time operations were suspended against rental accruing after termination of the suspension.

Tenneco Oil Co., 117 IBLA 120 (Dec. 3, 1990)

Shell Offshore, Inc., 117 IBLA 125 (Dec. 3, 1990)

When an oil and gas lessee has sold its natural gas and paid royalty thereon based on the price specified by sec. 104 of the Natural Gas Policy Act, 15 U.S.C. § 3314 (1988), and MMS subsequently assesses additional royalty based on the lessee's alleged failure to file a timely application for classification of the gas under sec. 102 of the Natural Gas Policy Act, 15 U.S.C. § 3312 (1988), which would have allowed a



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

higher ceiling price, the issue is whether the lessee breached its duty to market the gas by failing to seek classification of the gas at an earlier time and the Board may refer the case for an evidentiary hearing on that issue.

Phillips Petroleum Co., 117 IBLA 230 (Dec. 21, 1990)

REFUNDS

In the context of an appeal from a decision of MMS after audit assessing additional royalty on production from an oil and gas lease the issue is what, if any, additional royalty is due and owing to the lessor. The Board adheres to its holding in Shell Oil Co., 52 IBLA 74 (1981), and Mobil Oil Corp., 65 IBLA 295 (1982), that where an audit is made of royalty payments for an oil and gas lease, underpayments disclosed by the audit are properly offset by royalty overpayments on the same lease revealed within the period of the audit.

Forest Oil Corp., 113 IBLA 30 (Jan. 30, 1990)

97 I.D. 11

The offsetting of overpayments against underpayments of royalty on natural gas production from an offshore oil and gas lease may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Union Exploration Partners, Ltd., 113 IBLA 186  
(Feb. 15, 1990)



## OUTER CONTINENTAL SHELF LANDS ACT--Continued

### REFUNDS--Continued

The Board adheres to its determination that the 2-year period afforded by 43 U.S.C. § 1339(a) (1982), in which an oil and gas lessee may seek a refund of a royalty overpayment commences to run upon the making of the payment for which a refund is requested.

"Request for repayment." In order to constitute a "request for repayment" within the meaning of 43 U.S.C. § 1339(a) (1982), a document must, at a minimum, affirmatively seek a repayment of royalties tendered with respect to a specific lease.

No Government official has authority to waive the 2-year statutory time limit established by 43 U.S.C. § 1339(a) (1982), for filing a refund request for overpayment of royalties.

Conoco Inc., 114 IBLA 28 (Apr. 3, 1990)

## PATENTS OF PUBLIC LANDS

### GENERALLY

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177  
(Apr. 23, 1990) 97 I.D. 171



## PATENTS OF PUBLIC LANDS--Continued

### GENERALLY--Continued

When locations and lines established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. Where, as a result of two independent surveys, a hiatus was created between the south line of one township and the north line of the adjoining township, such hiatus was not included in patents to lands in either township but remains public land subject to survey.

Joie Osgood, 117 IBLA 204 (Dec. 21, 1990)

### CORRECTIONS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)



## PATENTS OF PUBLIC LANDS--Continued

### EFFECT

Upon issuance of a mineral patent for a mining claim in a wilderness area in a National Forest, fee simple title to the land described in the patent passes to the patentee. The land is private land, no longer subject to the mining laws, and the Bureau of Land Management has no authority to entertain challenges to regulation of surface uses of other land under Forest Service jurisdiction.

Virgil Horn, Marcella Horn, 117 IBLA 10 (Nov. 21, 1990)

### RESERVATIONS

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has the authority to correct factual errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and where a patent holder applies to have a patent corrected to eliminate an easement, that application was not erroneously included in the patent on the basis of a mistake of fact.

BLM has the authority to initiate and make corrections to a patent on its own motion, if all existing owners agree. Where the State of Alaska has an interest in the patent due to the inclusion of an easement for its benefit and, as such, is a concerned administrative agency, its objection to the reduction of the width of the easement in the patent precludes BLM from changing the patent on its own motion.

Lloyd Schade, State of Alaska, 116 IBLA 203 (Oct. 4, 1990)



#### PAYMENTS

(See also Accounts)

##### GENERALLY

A company check for oil and gas lease bid deposit is not an acceptable form of remittance under 43 CFR 3120.4-1 (1987), which requires remittances to be submitted in the form specified in the competitive sale notice, where that notice requires bidders to submit a bid deposit "by guaranteed remittance, i.e., cash, cashier's check, or money order."

Gulf States Petroleum, Inc., 113 IBLA 55 (Jan. 31, 1990)

#### POTASSIUM LEASES AND PERMITS

(See also Mineral Leasing Act)

##### LEASES

Readjustment of a potassium lease is an event that occurs at the end of the lease term and may signal new minimum royalty requirements, depending upon regulations in force at the time of readjustment.

A decision to readjust the annual minimum royalty payable for a potassium lease to \$3 per acre will be affirmed where the regulation in effect at readjustment provided for a minimum \$3 royalty for leases readjusted after the effective date of the regulation. For leases readjusted before the effective date of the regulation authorizing the \$3 rate however, the royalty was correctly set at \$2, as provided by regulations then in effect.

Texasgulf, Inc., 114 IBLA 66 (Apr. 6, 1990)



#### POWERSITE LANDS

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

#### PRACTICE BEFORE THE DEPARTMENT (See also Rules of Practice)

##### PERSONS QUALIFIED TO PRACTICE

An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. A person filing an appeal has the responsibility of showing that he is qualified under the regulation to represent the appellant.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)



#### PUBLIC LANDS

(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands)

#### GENERALLY

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Mr. & Mrs. Thomas J. Dekker, 114 IBLA 302 (May 10, 1990)

#### ADMINISTRATION

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

An appellant bears the burden of showing error in a BLM decision denying approval of a mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for



## PUBLIC LANDS--Continued

### ADMINISTRATION--Continued

preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

Robert L. Baldwin, Sr., & E. Rose Baldwin, 116 IBLA 84 (Sept. 17, 1990)

### CLASSIFICATION

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)



## PUBLIC LANDS--Continued

### DISPOSALS OF

#### Generally

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

#### RIPARIAN RIGHTS

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

Northern Michigan Exploration Co., 114 IBLA 177  
(Apr. 23, 1990) 97 I.D. 171



PUBLIC LANDS--Continued

RIPARIAN RIGHTS--Continued

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Mr. & Mrs. Thomas J. Dekker, 114 IBLA 302 (May 10, 1990)

SPECIAL USE PERMITS

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with



PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation and substantially followed.

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly reversed insofar as it purports to affect a period beyond the expiration date of the permits.

Patrick G. Blumm, dba Rio Grande Rapid Transit,  
116 IBLA 321 (Oct. 29, 1990)

PUBLIC RECORDS

(See also Administrative Procedure, Confidential Information)

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)



#### RECLAMATION LANDS

(See also Irrigation Claims, Rights-of-Way)

##### GENERALLY

The lands listed as subject to lease under the "Hardrock Minerals Leasing" regulations at 43 CFR 3560.3 and 43 CFR Part 3580 are the only areas which have been made subject to hardrock mineral leasing as a result of either the exercise of Secretarial discretion or Congressional directive. BLM may properly reject an application for a prospecting permit for hardrock minerals when the lands described in the application are not subject to the issuance of a hardrock mineral lease.

William Bade, 112 IBLA 312 (Jan. 10, 1990)

#### RECREATION AND PUBLIC PURPOSES ACT

Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

The purpose of providing a person with notice and an opportunity for a hearing prior to termination of a recreation and public purpose lease is to guarantee that person's right to due process prior to finalization of the action of termination. The "opportunity for a hearing" does not mean, however, that in all cases the Department must conduct a factfinding hearing. A hearing is not required in the absence of assertions of fact



RECREATION AND PUBLIC PURPOSES ACT--Continued

which, if proved true, would entitle the person to the relief sought.

Dona Ana Board of County Commissioners, 116 IBLA 108  
(Sept. 18, 1990)

REGULATIONS

(See also Administrative Procedure)

GENERALLY

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

Keith P. Carpenter (On Reconsideration), 113 IBLA 27  
(Jan. 30, 1990)



REGULATIONS--Continued

GENERALLY--Continued

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)



REGULATIONS--Continued

GENERALLY--Continued

One who deals with the Government is presumed to know the applicable laws and regulation, and the United States cannot be bound or estopped by an act of its officers or agents if to estop the Government would undermine the correct enforcement of a particular statute or regulation.

Thomas L. Sawyer, 114 IBLA 135 (Apr. 18, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

Payment of the balance of the bonus bid at a competitive lease sale is properly construed as timely where payment is received by BLM on the seventh working day after the lease sale within the time allowed by both the regulations in effect at the time of the sale and the proposed regulations promulgated prior to the sale.

Earl M. Cranston, 115 IBLA 230 (July 12, 1990)



## REGULATIONS--Continued

### GENERALLY--Continued

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

### APPLICABILITY

Assessments to compel compliance with regulations implementing the Mineral Leasing Act constitutes an exercise of the Department's regulatory power and is not stayed by the filing of a bankruptcy petition by an oil and gas lessee.

Chase Energy, Inc., 113 IBLA 69 (Feb. 9, 1990)

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)



## REGULATIONS--Continued

### APPLICABILITY--Continued

Imposition of an assessment to compel compliance with regulations implementing the Mineral Leasing Act is an exercise of the Department's regulatory power which is not stayed by the filing of a bankruptcy petition by an oil and gas lessee or operator.

Chase Energy, Inc., 115 IBLA 76 (June 18, 1990)

### BINDING ON THE SECRETARY

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

### FORCE AND EFFECT AS LAW

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)



## REGULATIONS--Continued

### FORCE AND EFFECT AS LAW--Continued

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

### INTERPRETATION

It is within the authority of the Department to interpret its own regulations, and its interpretation should be given great deference. Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, when it appears from the record that: (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for oil produced and removed from the lease; (2) the Department had accepted lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected,



REGULATIONS--Continued

INTERPRETATION--Continued

then the new MMS accounting procedure should be applied prospectively.

Sun Exploration & Production Co., 112 IBLA 373  
(Jan. 19, 1990) 97 I.D. 1

A regulation should be sufficiently clear that there is no basis for an oil and gas lessee's non-compliance with the regulation before that regulation is interpreted to the detriment of a lessee. If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of its Oil and Gas Payor Handbook, because that Handbook lacks the force and effect of law enjoyed by a statute or regulation.

Exxon Co., U.S.A., 113 IBLA 199 (Feb. 21, 1990)

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)



## REGULATIONS--Continued

### INTERPRETATION--Continued

Oil and gas lease royalty accounts are settled under rules in effect at the time charges at issue were incurred.

Where a 1987 audit discovered a discrepancy between sales and production volumes from an oil and gas lease had occurred in March 1985, MMS properly required the royalty rate to be calculated on actual production pursuant to the provision of 30 CFR 202.101 (1984).

An obligation to pay oil royalty for March 1985 using actual production to compute a royalty rate pursuant to 30 CFR 202.101 (1984) did not arise until 1987 when MMS ordered such payment to be made following an audit of the 1985 account.

An alleged conflict between Departmental oil and gas regulations and a policy guideline used by MMS to govern royalty administration failed to establish a foundation for a claim of equitable estoppel where no factual or legal conflict was shown to exist between the regulations and the guideline so as to establish the claimed misrepresentation by Federal employees.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)

Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, an exception exists when certain conditions are met. If (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for products removed from the lease; (2) the Department had accepted the lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation



REGULATIONS--Continued

INTERPRETATION--Continued

substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively only.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

Dona Ana Board of County Commissioners, 116 IBLA 108 (Sept. 18, 1990)

Rejection by BLM of an acquired lands oil and gas lease offer, which described the surveyed lands sought, in accordance with 43 CFR 3111.2-2(a) (1987), by legal subdivision, section, township, range, and meridian, because the offeror failed to file three copies of a map required by 43 CFR 3111.2-2(d) (1987), is improper. The map requirement is limited to acquired lands oil and gas lease offers for lands which cannot be conformed to the rectangular system of public land surveys.

Thomas Connell, 116 IBLA 113 (Sept. 20, 1990)



## REGULATIONS--Continued

### PUBLICATION

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

K. S. Hays v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 380 (July 20, 1990)

### VALIDITY

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Conoco, Inc., et al. (On Reconsideration), 113 IBLA 243 (Mar. 7, 1990)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly



## REGULATIONS--Continued

### VALIDITY--Continued

promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lease.

AMCA Coal Leasing, Inc. (On Reconsideration), 114 IBLA 246 (May 8, 1990)

## RENT

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to



RENT--Continued

the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)

A rental rate adjustment determination, modified below as a result of errors in the record necessitating such corrective action, will be affirmed on appeal in the absence of evidence by appellant which would warrant any further adjustment in the rental.

In the Matter of the Quarters Rental Rate Appeal of Mr. Cliff Walker, 8 OHA 232 (Oct. 24, 1990)

RES JUDICATA

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

Under the doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or



RES JUDICATA--Continued

equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

A final decision by the Department after a contest hearing holding land to be either mineral or nonmineral in character is res judicata and conclusive between the parties regarding the status of the land at the date of the hearing, but does not preclude further consideration of the character of the land based on subsequent exploration and development.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

The Government is not collaterally estopped to determine the validity of an unpatented mining claim even where the Government has previously unsuccessfully contested a neighboring mining claim encompassing an arguably similar mineral deposit.

United States v. Robert D. Fisher, 115 IBLA 277  
(July 26, 1990)



RIGHTS-OF-WAY

(See also Indians, Reclamation Lands)

GENERALLY

Provision of 43 CFR 2803.1-2 allows a rental increase to be paid in graduated increments with the full amount of the increase being deferred until the third year after the increase is effective. This provision only applies, however, where there was payment at a lower rate. It does not apply where there was never a lower rental rate, nor can a rental deposit be considered to have been a rental rate for purposes of obtaining the delayed increase allowed by the regulation.

Keith P. Carpenter (On Reconsideration), 113 IBLA 27 (Jan. 30, 1990)

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)



RIGHTS-OF-WAY--Continued

GENERALLY--Continued

Pursuant to 43 CFR 2803.1-2(b)(2)(ii), a reduction or waiver of rental for a communication site right-of-way may be granted when the holder provides without charge, or at a reduced rate, a valuable public service.

BLM may reduce rental payments for communication site rights-of-way if it determines pursuant to 43 CFR 2803.1-2(b)(2)(iv) that the imposition of the fair market value rental would cause undue hardship on the right-of-way holder and it is in the public interest to do so.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

A Bureau of Land Management appraisal of fair market value will not be set aside for failure to include five comparable electronic communication sites alleged to afford similar coverage to the appraised site, where no alternative appraisal or evidence is submitted to demonstrate that the allegedly comparable sites afford similar coverage, access, power, and terms to the subject site, or that inclusion of the five allegedly



RIGHTS-OF-WAY--Continued

GENERALLY--Continued

comparable sites would support a different conclusion than that reached by the Bureau of Land Management.

Randy L. Power dba ProComm, 114 IBLA 205 (Apr. 24, 1990)

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization automatically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

Wagner Equipment Co., 116 IBLA 275 (Oct. 22, 1990)

Where subsequent to approval of a Native allotment but prior to issuance by BLM of the document conveying legal title to the allottee, the allottee, as grantor, grants to the State of Alaska a public highway easement across her allotment, a request by the State to have that easement excluded from or reserved in the document conveying legal title will be denied.

State of Alaska, Dept. of Transportation & Public Facilities, 116 IBLA 317 (Oct. 29, 1990)



RIGHTS-OF-WAY--Continued

ACT OF MARCH 4, 1911

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

ACT OF FEBRUARY 25, 1920

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

A Bureau of Land Management decision approving or rejecting an application for a right-of-way or amendment to a right-of-way under 30 U.S.C. § 185 (1982), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)



RIGHTS-OF-WAY--Continued

APPLICATIONS

A Bureau of Land Management decision rejecting a right-of-way application for sewage stabilization lagoons filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Pete Zanetti, 113 IBLA 239 (Feb. 28, 1990)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

Ben J. Trexel, 113 IBLA 250 (Mar. 8, 1990)

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)



RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

An applicant for a right-of-way for the construction and operation of a water diversion and flume to serve a fish-propagation facility on adjoining land may be required to pay all reasonable administrative and other costs in processing the right-of-way application, pursuant to the provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982).

Earl M. Hardy, Box Canyon Trout Co., Inc., 113 IBLA 367 (Mar. 27, 1990)

A Bureau of Land Management decision approving or rejecting an application for a right-of-way or amendment to a right-of-way under 30 U.S.C. § 185 (1982), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

C. B. Slabaugh, 116 IBLA 63 (Sept. 5, 1990)



## RIGHTS-OF-WAY--Continued

### APPLICATIONS--Continued

Under FLPMA, the Secretary of the Interior has discretionary authority to grant rights-of-way. A BLM decision approving a trail right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved; made with due regard for the public interest; and no reason for disturbing the decision is shown.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)

### APPRAISALS

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

The appraised value of a communication site right-of-way pertains to each individual user and is not to be prorated among site users.

In establishing the fair market rental value for a communication site right-of-way, BLM shall not be limited by the estimated value at the time of issuance of the right-of-way.

An appraisal of fair market rental value for a communication site right-of-way may be set aside and the case remanded where the record on appeal shows



RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

insufficient analysis of the leases considered in the appraisal.

Lone Pine Television, Inc., 113 IBLA 264 (Mar. 9, 1990)

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

That portions of a right-of-way duplicate another grant previously obtained for a similar purpose does not entitle the grantee to a reduction of rental by subtracting the duplicated acreage from the area of the second grant.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

The Board of Land Appeals will uphold an appraisal of the fair market rental value of a right-of-way for the construction, operation, and maintenance of a water diversion, flume, and access road in conjunction with a fish-propagation facility on adjoining private land where the appraisal is based on a reasonable comparable sales analysis and the challenge to the appraisal does not establish error in the comparability evaluation.

Earl M. Hardy, Box Canyon Trout Co., Inc., 113 IBLA 367 (Mar. 27, 1990)



RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)

A BLM increase in the annual rental charge for a communication site right-of-way is properly affirmed where the holder of the right-of-way fails to establish by a preponderance of the evidence that the appraisal upon which the increase is based incorrectly determined the fair market rental value of the right-of-way by the comparable lease method of appraisal.

Union Pacific Railroad Co., 114 IBLA 399 (May 30, 1990)

The Board will not overturn a BLM appraisal of a communication site right-of-way by the comparable lease method of appraisal where the appellant fails to establish by a preponderance of the evidence either that the appraisal method was erroneous or that the appraised value is excessive. Specifically, the appraisal will be affirmed where appellant does not establish that BLM improperly eliminated certain private and Government leases from comparison with the right-of-way, or that BLM improperly failed to adjust for differences both in the cost of obtaining access to the communication sites and between BLM rights-of-way and private leases.

MCI Telecommunications Corp., 115 IBLA 117 (June 27, 1990)



RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of the right-of-way rental or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Southern Pacific Transportation Co., 116 IBLA 164  
(Sept. 26, 1990)

An appraisal of fair market value for a natural gas compressor site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where BLM has conducted an appraisal of fair market value of a natural gas compressor site right-of-way by utilizing comparable sales data for other compressor sites, its rental determination based thereon will not be overturned based on allegations that such sales are outdated, where the appraisal made negative adjustments for time and the sales presented by the right-of-way holder as comparable were not sales for compressor sites.

Western Field Production, Inc., 116 IBLA 225 (Oct. 12, 1990)



RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

A BLM appraisal of fair market rental value of a communication site lease will be upheld unless an appellant can show error in the appraisal methods used and demonstrate by convincing evidence that the rental charge is excessive. In the absence of a preponderance of evidence that the appraisal is erroneous, an appraisal generally may be rebutted only by another appraisal.

Gila Electronics, 117 IBLA 51 (Nov. 27, 1990)

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

CANCELLATION

BLM properly cancels a communications site right-of-way where the holder fails to pay the annual rental charges for the first and second years of the grant following several 30-day notifications by BLM of the fair market rental amount due for those years, as determined by appraisal.

Roy L. Parrish, 114 IBLA 336 (May 22, 1990)



#### RIGHTS-OF-WAY--Continued

##### CANCELLATION--Continued

If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization automatically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

Wagner Equipment Co., 116 IBLA 275 (Oct. 22, 1990)

#### CONDITIONS AND LIMITATIONS

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that



RIGHTS-OF-WAY--Continued

CONDITIONS AND LIMITATIONS--Continued

appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)  
97 I.D. 125

If the right-of-way grant document provides that failure to pay the annual rental in a timely manner results in summary termination without an administrative proceeding, the right-of-way authorization automatically terminates by operation of law upon failure to pay the rental on or before the anniversary date, as specified in the right-of-way document, and no rental accrues beyond that date.

Wagner Equipment Co., 116 IBLA 275 (Oct. 22, 1990)

FEDERAL HIGHWAY ACT

Those portions of mining claims located on land subject to a valid, ongoing, and pre-existing highway right-of-way granted to the State of California pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

William Peterson et al., 113 IBLA 19 (Jan. 26, 1990)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its



RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

A Bureau of Land Management decision rejecting a right-of-way application for sewage stabilization lagoons filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Pete Zanetti, 113 IBLA 239 (Feb. 28, 1990)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

Ben J. Trexel, 113 IBLA 250 (Mar. 8, 1990)



RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

The Board of Land Appeals will uphold an appraisal of the fair market rental value of a right-of-way for the construction, operation, and maintenance of a water diversion, flume, and access road in conjunction with a fish-propagation facility on adjoining private land where the appraisal is based on a reasonable comparable sales analysis and the challenge to the appraisal does not establish error in the comparability evaluation.

Earl M. Hardy, Box Canyon Trout Co., Inc., 113 IBLA 367 (Mar. 27, 1990)

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)  
97 I.D. 125



RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

A Bureau of Land Management decision rejecting a right-of-way application for a water diversion and water pipeline in a wilderness study area, filed pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

C. B. Slabaugh, 116 IBLA 63 (Sept. 5, 1990)

Under FLPMA, the Secretary of the Interior has discretionary authority to grant rights-of-way. A BLM decision approving a trail right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be based upon a reasoned analysis of the factors involved; made with due regard for the public interest; and no reason for disturbing the decision is shown.

A FONSI will be affirmed if the record supports a conclusion that all relevant areas of environmental concern were identified and carefully reviewed, and that the final determination of no significant impact is reasonable in light of the environmental analysis. A party challenging a FONSI determination must show that it was premised on a clear error of law or demonstrable error of fact, or that analysis failed to consider a substantial environmental question of material significance to the proposed action. The ultimate burden of proof is on the challenging party. Such burden must be established by objective proof. Mere expressions of a difference of opinion provide no basis for reversal.

Coy Brown, 115 IBLA 347 (Aug. 13, 1990)



## RIGHTS-OF-WAY--Continued

### FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Where BLM establishes the rental for an access road right-of-way granted under sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1988), in accordance with the schedule adopted pursuant to 43 CFR 2803.1-2(c)(1), and appellant fails to demonstrate error, BLM's rental determination will be affirmed.

Mr. & Mrs. Gerald H. Murray, 117 IBLA 138 (Dec. 6, 1990)

### NATURE OF DECISION

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

### NATURE OF INTEREST GRANTED

When Congress has enacted legislation to provide for rights-of-way for particular purposes, authorization to use public land for such purposes must be consistent with that legislation. Under the right-of-way provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), and its implementing regulations, 43 CFR Part 2800, authorization to use public land for a permanent access road to a wind energy park can only be accomplished through the issuance of a right-of-way grant. Approval of a plan of operations for a wind energy facility right-of-way does not constitute the authorization for an access



RIGHTS-OF-WAY--Continued

NATURE OF INTEREST GRANTED--Continued

road, which is not located on the lands described in the wind energy facility right-of-way grant.

Mesa Wind Developers, 113 IBLA 61 (Feb. 7, 1990)

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

Tucson Electric Power Co., 113 IBLA 327 (Mar. 15, 1990)

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)  
97 I.D. 125

OIL AND GAS PIPELINES

The National Environmental Policy Act of 1969 requires that every agency study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement applies to the preparation of environmental assessments which serve as



## RIGHTS-OF-WAY--Continued

### OIL AND GAS PIPELINES--Continued

a basis for a Finding of No Significant Impact. Under this requirement, all reasonable alternatives must be considered and obvious alternatives may not be ignored. A site which poses sufficiently higher risks to the reliable provision of an essential public service is not a reasonable alternative that must be studied in preparing an environmental assessment for an amendment of a right-of-way for a gas pipeline compressor station.

A Bureau of Land Management decision approving or rejecting an application for a right-of-way or amendment to a right-of-way under 30 U.S.C. § 185 (1982), is an exercise of discretion that will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made in due regard for the public interest, and no sufficient reason to disturb the decision is shown.

Robert M. Perry et al., 114 IBLA 252 (May 9, 1990)

## RULES OF PRACTICE

(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department)

### GENERALLY

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract for one of the Five Civilized Tribes is final for the Department and is not subject to appeal within the Department.

Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 105 (Jan. 17, 1990)



## RULES OF PRACTICE--Continued

### GENERALLY--Continued

The Board adheres to its determination that the 2-year period afforded by 43 U.S.C. § 1339(a) (1982), in which an oil and gas lessee may seek a refund of a royalty overpayment commences to run upon the making of the payment for which a refund is requested.

Conoco Inc., 114 IBLA 28 (Apr. 3, 1990)

### APPEALS

#### Generally

As a general rule, an administrative decision is properly set aside and remanded where it is not supported by a case record providing the Board with the evidence necessary for an objective, independent review of the basis for the decision.

Shell Offshore, Inc., 113 IBLA 226 (Feb. 28, 1990)  
97 I.D. 74

When an appellant attempts to remedy the defects which led to a BLM decision rejecting a nationwide oil and gas geophysical exploration bond rider by providing additional information on appeal, the Board may affirm the rejection decision but remand the matter to BLM for adjudication of the acceptability of the rider in light of the additional information.

Frontier Exploration, Inc., Frontier Geophysical Co.,  
114 IBLA 280 (May 9, 1990)



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Generally--Continued

A decision by a BLM officer which does not fall within any of the exceptions enumerated in 43 CFR 4.410 or provided by other duly promulgated regulation is subject to appeal to the Board of Land Appeals and a BLM official is without authority to state otherwise.

BLM is required to transmit the relevant case file within no more than 10 business days after receipt of a notice of appeal.

When a protest against a notice of intent to conduct geophysical operations has been filed or an appeal has been filed from a decision to allow such operations, BLM is obliged to inform the party filing the notice of intent that the notice cannot be processed until the protest and any appeal therefrom has been resolved.

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if BLM rejected a Native allotment application without first affording the applicant an opportunity for a hearing before a trier of fact, the decision to reject is not final, and the application was pending before the Department on Dec. 18, 1971. BLM erred in rejecting a request by the heirs of the applicant that the Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Heirs of Saul Sockpealuk, Heirs of Carl Takak, Heirs of Silas Sockpealuk, 115 IBLA 317 (Aug. 7, 1990)



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Generally--Continued

Associations of users of the California Desert Conservation Area who have participated in decisionmaking have standing to appeal a decision establishing motor vehicle travel routes in and around the Afton Canyon area of critical environmental concern.

High Desert Multiple-Use Coalition, Inc., California Assn of 4WD Clubs, Inc., California Off-Road Vehicle Assn, Inc., 116 IBLA 47 (Sept. 5, 1990)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1961 and closed in 1967 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

Michael Gloko, 116 IBLA 145 (Sept. 24, 1990)

#### Burden of Proof

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining or milling purposes, the Government has established a prima facie case of invalidity because such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant



RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

to affirmatively establish that the claim is used or occupied for mining and milling purposes.

United States v. Shiny Rock Mining Corp., 112 IBLA  
326 (Jan. 12, 1990)

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v.  
Bureau of Land Management (Appellant), 113 IBLA  
106 (Feb. 14, 1990)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA  
69 (June 15, 1990)



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Burden\_of Proof--Continued

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the



RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

In re Grassy Overlook Timber Sale, 115 IBLA 359  
(Aug. 14, 1990)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan first approved in writing or prescribed by the authorized officer, as required by regulation 43 CFR 3152.3-4(a). Where the record establishes that the Secretary's technical experts have evaluated unapproved plugging and abandonment work performed by an operator and have found such work deficient, the Secretary is entitled to rely on their professional opinion, absent a showing of error by a preponderance of the evidence.

Daniel C. Wychgram, 116 IBLA 89 (Sept. 17, 1990)



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Burden\_of Proof--Continued

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

James O. Steambarge, 116 IBLA 185 (Oct. 4, 1990)

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

#### Discovery

A request for the issuance of subpoenas is denied where the Board finds (i) that instead of proceeding with voluntary discovery in an orderly and timely manner, appellant precipitately filed an application for the issuance of subpoenas to three Government employees calling for them to appear as appellant's witnesses at a requested oral hearing and to bring with them to the hearing voluminous Government records; (ii) that in the absence of appellant's counsel having had an opportunity to review the documents requested prior to the hearing and to winnow therefrom material irrelevant to the issues involved in the appeal, the granting of the subpoenas requested would confront the Board at the hearing with the choice of either delaying the commencement of the hearing while the winnowing process took place or encumbering the record with a



RULES OF PRACTICE--Continued

APPEALS--Continued

Discovery--Continued

great deal of extraneous material by accepting into evidence all of the documents covered by the subpoenas; and (iii) that resort to either of these alternatives would not be compatible with the requirement that the Board's rules be interpreted so as to secure a just and inexpensive result without unnecessary delay.

Appeal of Noslot Cleaning Services, Inc., IBCA-2554  
(Aug. 14, 1990) 97 I.D. 231

Dismissal

When BLM adjusts a linear right-of-way rental, in accordance with the rental fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i), and the grantee files an appeal completely agreeing with that action, but complaining that BLM failed to adjust the rental for prior years, the grantee has failed to point out error in the action taken by BLM or to show how he has been adversely affected by the decision, and the appeal will be dismissed.

Jesse H. Johnson, 112 IBLA 369 (Jan. 19, 1990)

A request for review by a State Director of the Bureau of Land Management under 43 CFR 3165.3(b) is properly dismissed as untimely when it is filed more than 20 business days after the date a notice of violation or assessment or instruction, order, or decision issued under 43 CFR 3165.3(a) is received.

Han-San, Inc., 113 IBLA 361 (Mar. 22, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber sale could be recurring, where it is not evasive of review, a motion to dismiss for mootness may be granted.

In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (Apr. 6, 1990)

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decision rejecting a mineral patent application as containing information sufficient to confirm compliance with governing law),



RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

the Board of Land Appeals lacks authority to consider them.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. A person filing an appeal has the responsibility of showing that he is qualified under the regulation to represent the appellant.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

An appeal from a decision approving geophysical exploration on land within and adjacent to a wilderness study area will not be dismissed as moot even though the challenged action had occurred, where issues raised by the appeal are capable of repetition, and where failure



RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

to decide the appeal would cause substantial issues to evade review.

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed.

Where, on appeal, the principal objection to issuance of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

San Juan Citizens Alliance, Western Colorado Congress,  
114 IBLA 366 (May 24, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

An assignee of an oil and gas lease agrees to be bound by the terms and conditions of the lease as issued, including any stipulations consented to by the lessee as a condition of leasing. Accordingly, an appeal by an assignee of stipulations consented to by the lessee, his predecessor-in-interest, is properly denied.

Texaco Inc., 115 IBLA 369 (Aug. 15, 1990)

An appeal from a decision denying an application for a grazing permit will not be dismissed as moot even though the relevant grazing season has passed, where issues raised by the appeal are capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Pursuant to 43 CFR 1610.5-2(b) approval or amendment of resource management plans are not appealable to the Board of Land Appeals and an appeal is properly dismissed to the extent that it seeks review of such a plan.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)

Summary dismissal of an appeal for failure to timely serve a copy of the notice of appeal on the Solicitor is discretionary and a motion to dismiss is properly denied in the absence of any showing of prejudice.

George Gilchrist et al., 117 IBLA 142 (Dec. 11, 1990)

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Effect of

Under the doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

Thana Conk, 114 IBLA 263 (May 9, 1990)

While the filing of an appeal suspends the authority of a deciding official to act in the instant matter, it does not affect his authority to act on matters that relate to management or preservation of public lands. Whether to permit road construction in a wilderness study area is an issue independent of the rejection of a plan of operations proposing such activity.

Murray Perkins, Internat'l Silica Corp., 116 IBLA 288  
(Oct. 23, 1990)



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Failure to Appeal

Where a decision by BLM cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest is delivered to the last address of record of the holder of the interest, and where no appeal is filed by him, BLM's decision cancelling his interest becomes final for him.

Where the record fails to establish that a copy of a BLM decision cancelling an overriding royalty interest and requiring reimbursement of moneys previously received from that interest was received by the interest holder, by a qualified representative of her estate, or by her heirs, a failure to appeal does not render BLM's decision final.

Jase O. Norsworthy et al., 114 IBLA 96 (Apr. 17, 1990)  
97 I.D. 137

#### Hearings

A request for the issuance of subpoenas is denied where the Board finds (i) that instead of proceeding with voluntary discovery in an orderly and timely manner, appellant precipitately filed an application for the issuance of subpoenas to three Government employees calling for them to appear as appellant's witnesses at a requested oral hearing and to bring with them to the hearing voluminous Government records; (ii) that in the absence of appellant's counsel having had an opportunity to review the documents requested prior to the hearing and to winnow therefrom material irrelevant to the issues involved in the appeal, the granting of the subpoenas requested would confront the Board at the hearing with the choice of either delaying the commencement of the hearing while the winnowing process took place or encumbering the record with a great deal of extraneous material by accepting into evidence all of the documents covered by the subpoenas; and (iii) that resort to either of these alternatives



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Hearings--Continued

would not be compatible with the requirement that the Board's rules be interpreted so as to secure a just and inexpensive result without unnecessary delay.

Appeal of Noslot Cleaning Services, Inc., IBCA-2554  
(Aug. 14, 1990) 97 I.D. 231

#### Jurisdiction

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

#### Motions

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Motions--Continued

a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct that they never considered the release as constituting an abandonment or the mistake in bid claim.

The Board denies a Government motion for summary judgment for the failure of the appellant to state a claim for relief with respect to its unilateral mistake in bid claim, where the Board finds (i) that the Government has failed to furnish any information as to what actions the contracting officer took with respect to his bid verification duties upon the opening of bids; (ii) that in the absence of such information it is not possible to determine the reasonableness of the contracting officer's actions; and (iii) that in ruling upon a motion for summary judgment all inferences are to be drawn in favor of the party against whom the motion for summary judgment is advanced.

An appellant's cross-motion for summary judgment is denied where the Board finds (i) that the motion is predicated upon a particular application of the law of warranties; (ii) that the principal grounds for the motion appears to be based upon the provisions of the Uniform Commercial Code; (iii) that all of the cases cited which apparently involve the Uniform Commercial Code are state cases; (iv) that in regard to such cases the appellant has failed to show that the principles apparently enunciated therein have been endorsed by the Federal courts so as to become a part of what has been described as the general Federal common law; (v) that the state cases so relied upon have not been shown to be dispositive of the question presented; and (vi) that



RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

appellant has failed to show that it is entitled to summary judgment as a matter of law.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193

A request for the issuance of subpoenas is denied where the Board finds (i) that instead of proceeding with voluntary discovery in an orderly and timely manner, appellant precipitately filed an application for the issuance of subpoenas to three Government employees calling for them to appear as appellant's witnesses at a requested oral hearing and to bring with them to the hearing voluminous Government records; (ii) that in the absence of appellant's counsel having had an opportunity to review the documents requested prior to the hearing and to winnow therefrom material irrelevant to the issues involved in the appeal, the granting of the subpoenas requested would confront the Board at the hearing with the choice of either delaying the commencement of the hearing while the winnowing process took place or encumbering the record with a great deal of extraneous material by accepting into evidence all of the documents covered by the subpoenas; and (iii) that resort to either of these alternatives would not be compatible with the requirement that the Board's rules be interpreted so as to secure a just and inexpensive result without unnecessary delay.

Appeal of Noslot Cleaning Services, Inc., IBCA-2554  
(Aug. 14, 1990) 97 I.D. 231



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Notice of Appeal

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

Thana Conk, 114 IBLA 263 (May 9, 1990)

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)

If a mining claimant files an affidavit of assessment work or notice of intention to hold without sufficient service charges as required by 43 CFR 3833.1-3, regulation 43 CFR 3833.1-4 provides for a 30-day compliance period during which this deficiency may be corrected prior to rejection. Because rejection of annual filings does not occur, if at all, until expiration of the compliance period pursuant to 43 CFR 3833.1-4, a decision notifying the claimant of the deficiency is interlocutory, i.e., not final for purposes of appeal. A notice of appeal filed by the claimant during the compliance period may be dismissed



RULES OF PRACTICE--Continued

APPEALS--Continued

Notice of Appeal--Continued

as premature and, in such case, the substance of the "appeal" should be treated as a protest.

Bennie Sinerius, 115 IBLA 312 (Aug. 7, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

Reconsideration

A motion for reconsideration is denied where appellant fails to apprise the Board of any significant newly discovered evidence, or evidence not duly considered in the course of rendering the principal decision.

Appeal of Lonnie Gene Partout (On Reconsideration), IBCA-2280 (Mar. 9, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Reconsideration--Continued

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373  
(May 24, 1990)

Except in the case where the petitioning party contends that it has discovered new evidence that could not have been discovered earlier, the Board will generally deny a petition for reconsideration if it is not based on an asserted error of law.

Appeals of Harvey C. Jones, Inc. (On Reconsideration),  
IBCA-2070 et al. (Sept. 10, 1990)

Service on Adverse Party

The Board has discretion not to dismiss an appeal for failure to serve copies of appeal documents on an adverse party, as the regulations state merely that such failure will "subject the appeal to dismissal." In the absence of a showing of prejudice on the adverse party, a motion to dismiss for failure to serve is properly denied.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263



RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal

Standing to appeal requires that an appellant be both a party to the decision appealed from and adversely affected by the decision. To be adversely affected, an appellant must have a legally cognizable interest in the land at issue.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

In the absence of an appeal directly presenting the propriety of BLM's demands for additional information in the context of a pending mineral patent application (such as an appeal from a decision rejecting a mineral patent application as containing information sufficient to confirm compliance with governing law), the Board of Land Appeals lacks authority to consider them.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

Standing to appeal requires that an appellant not only have been a party to the decision appealed from but also be adversely affected by the decision. When the record before the Board does not show that the party filing an appeal has a legally cognizable interest in the matter at issue, the appeal is properly dismissed for lack of standing to appeal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Standing to appeal requires that an appellant be a party to the case adversely affected by the decision appealed. A cultural resources permittee is not a party to a case with standing to appeal a decision adjudicating a right-of-way holder's compliance with a stipulation to the right-of-way requiring mitigation of impacts to cultural resources.

Specific procedures for review of adjudication of a cultural resource use permit are found in the regulations at 43 CFR Part 7, Subpart B. These provisions give the permittee a right to request a conference to discuss a disputed decision relating to issuance, denial, modification, suspension, or revocation of a permit or the inclusion of specific terms and conditions in a permit. 43 CFR 7.36(a). Such decisions are properly distinguished from a decision adjudicating a right-of-way holder's compliance with a stipulation requiring mitigation of damage to cultural resources and denial of a conference in the latter context entails no reversible error.

The Board has no jurisdiction to review Bureau of Land Management procedures outlined in a manual in the absence of a decision applying such procedures to dispose of a case to which appellant is a party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

An appeal from a BLM decision approving the use of herbicides as a means to control undesirable vegetation on public lands (based on a programmatic environmental impact statement) is properly dismissed where BLM has reserved the decision of whether and where to authorize actual herbicide spraying until after preparation of



RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

site-specific environmental assessments or environmental impact statements.

Salmon River Concerned Citizens et al., Lois Hollingsworth, 114 IBLA 344 (May 22, 1990)

To establish standing to appeal under provision of 43 CFR 4.410 one must be a party to the case and must allege to have an adversely affected recognizable interest. Where one has shown that, prior to approval of an application to drill a geothermal well, objection was stated in writing to the drilling, and on appeal it is urged that such drilling will damage domestic water sources, one has standing to appeal.

Dorothy A. Towne et al., 115 IBLA 31 (June 8, 1990)

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Because of the Department's obligation to lease to the first-qualified applicant, issuance of a lease pursuant to a noncompetitive future interest oil and gas lease offer for acquired lands does not preclude a junior offeror from challenging issuance of the lease on appeal from BLM's rejection of the junior offer for the reasons that the lands requested were leased to a senior offeror. The junior offeror has standing to appeal for, if the lease is cancelled, the junior offer must be processed. The right to challenge issuance of the lease and the Department's authority to cancel an improperly issued lease were not lost through estoppel or laches where the junior offeror was not notified of lease issuance nor allowed to be heard until the decision rejecting its offer.

Beard Oil Co., 117 IBLA 54 (Nov. 27, 1990)

Even though an appellant corporation is not incorporated until after the date of issuance by BLM of the decision it seeks to appeal, its appeal is not properly dismissed for lack of standing if it appears (1) that the appellant corporation succeeded to the interests of an entity that participated in the decisionmaking process and, thus, became a party to the case, and (2) that both the appellant corporation and the earlier entity are adversely affected by BLM's decision.

Red Thunder, Inc., et al., 117 IBLA 167 (Dec. 19, 1990)  
97 I.D. 263



RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a), and the decisional law of the Department, and not by judicial standing determinations.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

Statement of Reasons

Unlike the failure to timely file a notice of appeal, failure to timely file a statement of reasons does not deprive the Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the required time makes the appeal subject to summary dismissal. The Board avoids procedural dismissals when there has been no showing that the delay in filing the statement of reasons prejudiced the adverse party.

James C. Mackey, 114 IBLA 308 (May 14, 1990)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

Shell Offshore Inc., 116 IBLA 246 (Oct. 17, 1990)



RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing

A request for review by a State Director of the Bureau of Land Management under 43 CFR 3165.3(b) is properly dismissed as untimely when it is filed more than 20 business days after the date a notice of violation or assessment or instruction, order, or decision issued under 43 CFR 3165.3(a) is received.

Han-San, Inc., 113 IBLA 361 (Mar. 22, 1990)

A Minerals Management Service decision dismissing an appeal of a royalty payment order as untimely will be reversed where it appears that the order was merely implementing a prior royalty valuation decision issued to the same lessee, covering the same production from the same leases, which was at the time the subject of a timely filed appeal.

Walter Van Norman, Jr., 114 IBLA 56 (Apr. 6, 1990)

While during the pendency of an appeal from a decision of the Minerals Management Service dismissing an appeal as untimely, the regulations are amended to provide that a delay in filing a notice of appeal to the Director, Minerals Management Service, will be waived if the notice of appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing by 30 CFR 290.3(a)(1), the Board may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases.

Conoco, Inc., 115 IBLA 105 (June 27, 1990)



## RULES OF PRACTICE--Continued

### APPEALS--Continued

#### Timely Filing--Continued

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

### EVIDENCE

The Board has full authority to reverse findings of fact made by an Administrative Law Judge. However, when the resolution of disputed facts is influenced by the Judge's findings of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)



## RULES OF PRACTICE--Continued

### EVIDENCE--Continued

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor),  
113 IBLA 352 (Mar. 22, 1990)

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

Pete Stamatakis v. Bureau of Land Management, 115 IBLA  
69 (June 15, 1990)

A Government motion for summary judgment filed in connection with a contractor's unilateral mistake in bid claim is denied where the Government fails to show that the release language included in a modification to the contract (relied upon by the Government for its affirmative defenses of abandonment, novation, release and accord, and satisfaction) either expressly or by implication refers to any mistake in bid claim where the Board finds that an affidavit filed by appellant raises a genuine issue of material fact as to the intention of the parties at the time the modification containing the release in question was negotiated and executed. The Government's motion for summary judgment is also denied on the alternative ground that subsequent to the execution of the release the parties showed by their conduct



## RULES OF PRACTICE--Continued

### EVIDENCE--Continued

that they never considered the release as constituting an abandonment or the mistake in bid claim.

Appeal of Gardner Zemke Co., IBCA-2626 (June 19, 1990)  
97 I.D. 193

### GOVERNMENT CONTESTS

Where BLM does not challenge the validity of a millsite claim, a decision ordering the cessation or limitation of occupancy based on the statutory limitation that allowable surface uses of a millsite claim are only those reasonably incident to mining may only be entered after notice and an opportunity for a hearing. If BLM desires to challenge a millsite owner's occupancy as not reasonably related to his mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it is required to bring a contest alleging such grounds, except where the record shows an absence of any mining activities.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

Where a Government contest complaint against a mining claim contains charges which, if proved, would render the claim invalid, and the contestee fails to timely file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void.

When the Government issues a mining claim contest complaint to more than one contestee and subsequently issues a decision declaring the interests in the claim of those contestees null and void for failure to file a timely answer to the complaint, a contestee appealing that decision has no standing to challenge it on the



## RULES OF PRACTICE--Continued

### GOVERNMENT CONTESTS--Continued

basis of failure to properly serve another contestee, where the appealing contestee has affirmatively alleged that he does not represent the other contestee.

Robert D. McGoldrick et al., 115 IBLA 242 (July 18, 1990)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the record does not establish applicant's qualifying use, the Bureau of Land Management shall initiate a Government contest so that the factual issues can be resolved at a hearing.

State of Alaska, 117 IBLA 148 (Dec. 13, 1990)

### HEARINGS

When a hearing is held pursuant to 43 CFR 3563.4(c), affording a sodium preference right lease applicant an opportunity to demonstrate entitlement, the applicant has both the burden of going forward and the ultimate burden of proof of showing that a valuable sodium deposit has been discovered. If there is an appeal from the Administrative Law Judge decision following the hearing, the appealing party has the burden of showing error in the Administrative Law Judge's decision.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)



RULES OF PRACTICE--Continued

HEARINGS--Continued

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

June I. Degnan (On Reconsideration), 114 IBLA 373  
(May 24, 1990)

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)



## RULES OF PRACTICE--Continued

### HEARINGS--Continued

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and BLM properly reviewed the same information submitted to this Board.

Sealaska Corp., 115 IBLA 249 (July 19, 1990)

Sealaska Corp., 115 IBLA 257 (July 19, 1990)

A stipulation by counsel for the Forest Service and a mineral claimant that there was some limestone "of sufficient carbonate content to be located under the 1872 Mining Law" does not prevent review of the record on appeal to determine if there was a valid location of a mineral on the claim under the mining law.

A prima facie case showing invalidity of a limestone mining claim located after July 23, 1955, for use as decorative stone is established by proof that the stone is a common variety lacking any property giving it distinct and special value.

New evidence offered in support of an application for a rehearing must tend to show that the party seeking rehearing has some likelihood of success if the application is to be allowed. The applicant for a rehearing must also explain why the evidence offered on appeal was not presented at the original hearing, if the evidence could have been available then.

United States v. Sherman C. Smith & Lynda K. Sellers Smith, 115 IBLA 398 (Aug. 22, 1990)



## RULES OF PRACTICE--Continued

### HEARINGS--Continued

Although 43 CFR 2912.1-1(c) appears to provide that notice and an opportunity for a hearing are only available to a recreation and public purpose lessee when BLM is contemplating termination of the lease for an inconsistent use, but not where there is nonuse, the preamble to the final promulgation of 43 CFR 2912.1-1(c) clearly indicates that the Department intended that notice and opportunity for a hearing be extended to the lessee where termination is sought for inconsistent use or for nonuse.

The purpose of providing a person with notice and an opportunity for a hearing prior to termination of a recreation and public purpose lease is to guarantee that person's right to due process prior to finalization of the action of termination. The "opportunity for a hearing" does not mean, however, that in all cases the Department must conduct a factfinding hearing. A hearing is not required in the absence of assertions of fact which, if proved true, would entitle the person to the relief sought.

Dona Ana Board of County Commissioners, 116 IBLA 108  
(Sept. 18, 1990)

### PRIVATE CONTESTS

A contest complaint is required to contain a statement in clear and concise language of the facts constituting the grounds of the contest. A party seeking a hearing as to the mineral character of land which has been subject to a prior Departmental hearing must make a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such



RULES OF PRACTICE--Continued

PRIVATE CONTESTS--Continued

thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

An affidavit by a contest complainant is not a substitute for an affidavit of a witness corroborating the factual allegations of the complaint as required by 43 CFR 4.450-4(c). In the absence of an affidavit of a corroborating witness, a private contest complaint is properly dismissed.

Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299  
(Mar. 12, 1990) 97 I.D. 109

A timely filed state protest of a Native allotment pursuant to ANILCA, sec. 905, prevents legislative approval of the allotment from taking effect.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)

PROTESTS

Where legislative approval of a Native allotment was prevented by timely and effective state protest, adjudication of the ensuing contest proceeding must conform to regulations governing contests without further application of provisions of ANILCA.

An extension of time to file an answer is permitted under Departmental regulations governing contest procedure. Where application for extension of time to answer contest complaint was timely filed with BLM by a Native allotment applicant, it was error to fail to consider and grant the request which was made in conjunction with a motion to dismiss.

William J. Felix, 114 IBLA 86 (Apr. 11, 1990)



## RULES OF PRACTICE--Continued

### PROTESTS--Continued

Withdrawal of patent applications prior to adjudication of a protest against issuance of patent requires dismissal without prejudice of the protest proceedings.

Sunshine Mining Co. v. State of Idaho, 114 IBLA 317  
(May 14, 1990)

Pursuant to 43 CFR Subpart 4160, a proposed BLM decision denying a grazing preference application does not become final until 15 days after receipt of the decision. A notice of appeal filed before the proposed decision becomes final should be treated by BLM as a protest. However, where such a matter has been forwarded to this Board, we need not remand the matter if no useful purpose would be served thereby.

Marvin Hutchings v. Bureau of Land Management, 116 IBLA 55 (Sept. 5, 1990)

## SECRETARY OF THE INTERIOR

(See also Administrative Authority)

Where the Secretary proposes to use water developed by the Bureau of Reclamation for irrigation purposes and wildlife purposes without specific legislative directives, the Secretary must answer two questions: (1) does the Secretary, through the Fish and Wildlife Service, have authority to acquire Project water rights and use them for fish and wildlife purposes at Stillwater; and, (2) if the answer to the first question is in the affirmative, does the Secretary, through the Bureau of Reclamation, have authority to transport water so acquired through Project facilities to Stillwater Wildlife Management Area.

There is sufficient authority under the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq.; the National Wildlife Refuge System Administration Act,



SECRETARY OF THE INTERIOR--Continued

16 U.S.C. § 668dd; the Migratory Bird Conservation Act, 16 U.S.C. § 715d; the Fish and Wildlife Improvement Act of 1978, 16 U.S.C. § 742f(a)(4); and the Endangered Species Act, 16 U.S.C. § 1534, for the Secretary to acquire water rights for fish and wildlife purposes for Stillwater Wildlife Management Area.

The Secretary has sufficient authority to transport water to Stillwater Wildlife Management Area for wildlife purposes based upon the Washoe Project authorization, 43 U.S.C. § 614, the Reclamation Project Act of 1939, 43 U.S.C. § 389, and the Water Project Recreation Act, 16 U.S.C. § 4601-18(a).

Authority to Provide Water to Stillwater Wildlife Management Area, M-36967 (July 10, 1989) 97 I.D. 32

SEGREGATION

A decision rejecting a desert land entry application on the ground that the land is within an unpatented mining claim will be reversed and remanded where no final certificate of mineral entry was in effect at the time the desert land entry application was filed and where BLM records strongly suggest that the unpatented mining claims are invalid and, therefore, have no segregative effect.

Nancy M. Swallow, A. Dean Martineau, 112 IBLA 321 (Jan. 12, 1990)

BLM properly declares a placer mining claim null and void ab initio where, at the time it was located, the affected land was segregated from mineral entry by the filing of an application for a public airport lease, even though such application had later been relinquished.

Boyad Tanner et al., 113 IBLA 387 (Mar. 28, 1990)



#### SEGREGATION--Continued

The Federal District Court injunction issued in National Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), cert. granted sub nom., Lujan v. National Wildlife Federation, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990) (No. 89-640), is without effect as to land for which BLM issued a purported Oct. 29, 1981, termination of classification, when the classification had in fact automatically terminated pursuant to sec. 4 of the Classification and Multiple Use Act of 1964 prior to the effective date of the injunction.

Pursuant to the Classification and Multiple Use Act of 1964 the segregative effect of a disposal classification for a tract of land larger than 2,500 acres terminated automatically 2 years after publication of the notice of proposed classification, unless a continuance was obtained. This Board will not apply the "notation" or "tract book" rule in a manner which thwarts this clear congressional intent.

Phelps Dodge Corp., 115 IBLA 214 (July 3, 1990)

A decision rejecting a desert land entry application on the ground that the land is appropriated by unpatented mining claims will be reversed where a final certificate of mineral entry has not been issued for the land at the time the desert land entry application was filed.

Bobby L. Franklin, 116 IBLA 29 (Aug. 27, 1990)



SODIUM LEASES AND PERMITS  
(See also Mineral Leasing Act)

LEASES

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the 1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful exploitation need not be shown, and a preference right lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A



## SODIUM LEASES AND PERMITS--Continued

### LEASES--Continued

determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given



## SODIUM LEASES AND PERMITS--Continued

### LEASES--Continued

the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

### PERMITS

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the



## SODIUM LEASES AND PERMITS--Continued

### PERMITS--Continued

1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful exploitation need not be shown, and a preference right lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist



## SODIUM LEASES AND PERMITS--Continued

### PERMITS--Continued

in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The



## SODIUM LEASES AND PERMITS--Continued

### PERMITS--Continued

probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)

### PREFERENCE RIGHT LEASES

To establish the discovery of a valuable deposit of sodium, a preference right lease applicant must show the existence of a mineral deposit within the permit area of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. This test is almost identical to the objective standard for determining whether a person locating a claim under the 1872 Mining Law (30 U.S.C. § 21 (1982)) has perfected his claim by the discovery of a valuable mineral. The "marketability test" is also applied to determine if there is a reasonable prospect for developing a "paying mine." This requires a showing of a reasonable prospect that the "valuable mineral" can be extracted, removed, and marketed at a profit.

The "prudent person" and "marketability" tests require a showing that as a present fact (considering historic price and cost factors and assuming those factors will continue) there is a reasonable likelihood that a paying mine can be developed. Actual successful exploitation need not be shown, and a preference right lease applicant is not required to show that mineral of



## SODIUM LEASES AND PERMITS--Continued

### PREFERENCE RIGHT LEASES--Continued

sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. He need only show, based upon the mineralization exposed and reasonable geologic and market projections, that a person of ordinary prudence would expend further labor and means with the reasonable expectation that a profitable mine will thereby be developed.

If, at any time during mineral exploration, it is deemed prudent to commence development, the initiation of development activities is justified, even though further exploration may be warranted. However, if not enough is known about either the size or quality of the mineralization to justify commencing development, and it would be possible to have a paying mine if the size of the mineralized body or value of the mineral could be increased, further exploration is warranted. A determination that further exploration is warranted is not sufficient to establish the discovery of a valuable deposit of a mineral.

There is a clear distinction between "exploration" and "development" as those terms relate to discovery under the mining laws. The separate stages of mining activity serve as a basis for determining what further mining activity a prudent man would be justified in undertaking. Exploration work is that work which is undertaken to determine whether valuable minerals exist in sufficient quality and quantity that there is a reasonable prospect that a paying mine could be developed. Development work is undertaken only after this determination has been made. A preference right lease applicant must show that a discovery either existed or could reasonably have been anticipated prior to the expiration of the prospecting permits.

When further exploration work would not materially increase the reasonably projected quantity or quality of the sodium deposit, a discovery determination must be based on the showing that there is a reasonable prospect that the deposit can be mined, processed, and marketed at a profit. This determination must be made as of the date the preference right lease applicant



## SODIUM LEASES AND PERMITS--Continued

### PREFERENCE RIGHT LEASES--Continued

fulfilled all the prerequisites for determining entitlement to a preference right lease. Thus evidence concerning subsequent costs and market conditions have relevance only to the extent they reflect what may reasonably have been anticipated at the expiration of the prospecting permits. When making a final showing, the applicants must also show that there is a reasonable probability that the mineralization can be mined in a manner which will be in compliance with the proposed lease terms.

When determining whether it can reasonably be expected that a preference right lease applicant would be able to profitably market the leased products, given the costs of mining the deposit and producing the products, it is not necessary to know the exact cost of production or the exact price which might be received. This determination may be based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product.

It is reasonable to expect that during the course of mine development the operator will find it necessary to modify and further refine its mining plan. Thus, it is improper for BLM to reject an application because the data submitted by the preference right lease applicant was not sufficiently specific to form the basis for an assurance that a paying mine could be developed. The probability that there will be modifications does not so negate cost and price estimates so as to make them meaningless because the information concerning the anticipated costs and returns need not be exact. The applicable legal standard does not require an applicant to prove with absolute certainty that a paying mine will result. The applicant need only prove that a prudent person would expend additional labor and means with a reasonable prospect of success in developing a paying mine.

Yankee Gulch Joint Venture et al. (Respondent) v. Bureau of Land Management (Appellant), 113 IBLA 106 (Feb. 14, 1990)



### SPECIAL USE PERMITS

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

If a party protests and refuses to comply with a requirement that is found to be incorrect on review, he is not subject to sanctions for not complying. Thus, where a special use permittee refuses to pay use fees and demands a deduction, he is not subject to sanctions for failure to pay timely if BLM allows his request for deduction.

A decision by BLM to suspend special use permits will be affirmed where a special use permittee violates the terms of his permit by failing to provide BLM with timely trip logs containing relevant trip data and by failing to report in writing an accident in which a person suffered an injury requiring medical attention beyond first aid, and where the permit expressly provides for suspension of the permits and the procedural steps set out in the stipulation and substantially followed.

A BLM decision suspending yearly special use permits issued for commercial river rafting is properly



#### SPECIAL USE PERMITS--Continued

reversed insofar as it purports to affect a period beyond the expiration date of the permits.

Patrick G. Blumm, dba Rio Grande Rapid Transit,  
116 IBLA 321 (Oct. 29, 1990)

#### STARE DECISIS

Where a prior final Departmental administrative decision has expressly declined to consider an issue, the doctrine of res judicata or its administrative counterpart, the doctrine of administrative finality, ordinarily will not bar an appellant from raising the issue in a subsequent appeal. Further, the Secretary, acting through the Board, is not estopped by the principles of finality of administrative adjudication from correcting or reversing an erroneous decision by his subordinates or predecessors in interest.

Seldovia Native Ass'n, Inc., 113 IBLA 218 (Feb. 27,  
1990)

#### STATE COURTS

The Federal Government is not bound by a State court decision to which the Federal Government was not a party.

Scott W. Bradshaw et al. v. Acting Muskogee Area Director,  
Bureau of Indian Affairs, 18 IBIA 339 (July 3,  
1990)



#### STATE GRANTS

There is a presumption that land granted to a state for school purposes was of the character contemplated by the grant, and that title to the land has consequently passed to the state. Where a mining claimant contends that land within a state school grant was mineral in character when surveyed, and was therefore excluded from the grant, the mining claimant bears the burden of proving the land was mineral in character.

This Department will not entertain review of an appeal from a determination that land located by a mineral claimant was not Federally owned where the appeal is made under circumstances indicating that an opinion is sought to facilitate issuance of a lease to the same land from the state and where appellant fails to point to error in the BLM decision appealed from.

George McDevitt, 113 IBLA 287 (Mar. 12, 1990)

#### STATE LANDS

Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)



#### STATE SELECTIONS

(See also School Lands, Swamplands)

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

#### STATUTES

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations, and reliance on allegedly incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Magness Petroleum Corp., 113 IBLA 214 (Feb. 23, 1990)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Jack Hammer dba Hammer Oil Co., 114 IBLA 340 (May 22, 1990)



## STATUTORY CONSTRUCTION

### ADMINISTRATIVE CONSTRUCTION

It is within the authority of the Department to interpret its own regulations, and its interpretation should be given great deference. Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, when it appears from the record that: (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for oil produced and removed from the lease; (2) the Department had accepted lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively.

Sun Exploration & Production Co., 112 IBLA 373  
(Jan. 19, 1990) 97 I.D. 1

An obligation to pay oil royalty for March 1985 using actual production to compute a royalty rate pursuant to 30 CFR 202.101 (1984) did not arise until 1987 when MMS ordered such payment to be made following an audit of the 1985 account.

Eighty-Eight Oil Co., 115 IBLA 386 (Aug. 16, 1990)



## STATUTORY CONSTRUCTION--Continued

### ADMINISTRATIVE CONSTRUCTION--Continued

Normally an interpretive ruling stating the accounting procedures to be used for royalty calculation may be given retroactive effect. However, an exception exists when certain conditions are met. If (1) for several years the lessee had applied an accounting procedure which conformed with a reasonable interpretation of the applicable regulations when calculating the royalty due for products removed from the lease; (2) the Department had accepted the lessee's royalty accounting procedure for several years before issuing an interpretive ruling that required a different accounting procedure; (3) the new procedure was an abrupt departure from a well-established practice, and not an attempt to fill a void in an unsettled area of the law; and (4) the prejudice to the lessee affected by retroactive application of the new interpretation substantially outweighs the statutory interest and purposes sought to be protected, then the new MMS accounting procedure should be applied prospectively only.

Union Oil Co. of California, Union Exploration Partners, Ltd., 116 IBLA 8 (Aug. 24, 1990)

## SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

### GENERALLY

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change his position for the worse.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

GENERALLY--Continued

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburgh & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change its position for the worse.

Eastern Minerals Internat'l, Inc., 117 IBLA 221 (Dec. 21, 1990)

ADMINISTRATIVE PROCEDURE

Generally

If a party has moved for certification of a ruling by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124, the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272. The Board may grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

Departmental regulation 43 CFR 4.1273 provides that an appellant's brief is due within 30 days of the filing of a notice of appeal and that failure to file a timely brief subjects the appeal to summary dismissal. However, the failure to file a brief is not fatal if the notice of appeal contains sufficient grounds to support an appeal.

Where an appellant fails to appear at a hearing and an Administrative Law Judge issues a decision sustaining an NOV, the Board will not order a new hearing and the appeal will be dismissed if the appellant's notice of appeal or brief fails to state why the NOV should not be sustained.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 114 (June 27, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden\_of Proof

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for less than 2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co.  
v. Office of Surface Mining Reclamation & Enforcement,  
115 IBLA 49 (June 12, 1990)

Findings

The applicable regulation, 43 CFR 4.1273(c), requires an appellant to "state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." The regulation applies to both petitions for discretionary review and appeals arising under the Surface Mining Control and Reclamation Act of 1977.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co.  
v. Office of Surface Mining Reclamation & Enforcement,  
115 IBLA 49 (June 12, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Intervention

Where an application for review of a permit is pending before an Administrative Law Judge and the permittee and OSMRE agree to the nature of the issue remaining after settlement by them of the other issues raised by the application, such agreement will not preclude consideration of any of the settled issues at the behest of an intervenor in the proceeding, whether intervention occurred before or after the settlement.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Scope of Review

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Scope of Review--Continued

The Interior Board of Land Appeals is not the proper forum to decide constitutional issues.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

APPEALS

Generally

If a party has moved for certification of a ruling by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124, the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272. The Board may grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

It is essential to the proper functioning of the Department's administrative review process that all agencies whose decisions are subject to appeal to the Board of Land Appeals forward the complete, original administrative record to the Board within 10 business days of receipt of a notice of appeal. An agency does not have discretion to decide whether to submit the case file to the Board for review. The agency may not withhold the case file while it reviews an appellant's reasons for appeal, either to determine whether its decision was incorrect or to prepare a response to appellant's reasons. If, after having forwarded the record, an agency determines it wishes to reconsider its decision, it may request the Board to vacate or set aside the decision and remand the matter.

Utah Chapter Sierra Club, 114 IBLA 172 (Apr. 20, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

The applicable regulation, 43 CFR 4.1273(c), requires an appellant to "state specifically the rulings to which there is an objection, the reasons for such objections, and the relief requested." The regulation applies to both petitions for discretionary review and appeals arising under the Surface Mining Control and Reclamation Act of 1977.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

Departmental regulation 43 CFR 4.1273 provides that an appellant's brief is due within 30 days of the filing of a notice of appeal and that failure to file a timely brief subjects the appeal to summary dismissal. However, the failure to file a brief is not fatal if the notice of appeal contains sufficient grounds to support an appeal.

Where an appellant fails to appear at a hearing and an Administrative Law Judge issues a decision sustaining an NOV, the Board will not order a new hearing and the appeal will be dismissed if the appellant's



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

notice of appeal or brief fails to state why the NOV should not be sustained.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 114 (June 27, 1990)

CESSATION ORDERS

Generally

The record on appeal establishes that the mineral and surface owner was cited and served with notices of violation. Therefore, subsequent cessation orders issued for failure to abate the NOV's were not invalid for failure to cite and serve the underlying NOV's on said mineral and surface owner.

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

OSMRE is not divested of its authority to carry out the statutory mandate to issue failure to abate cessation orders because it fails to immediately issue such orders.

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

The doctrines of collateral estoppel and equitable estoppel will not preclude OSMRE from issuing its own cessation order in situations where a similar notice of violation and cessation order was issued and litigated by the state regulatory authority since the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CESSATION ORDERS--Continued

Generally--Continued

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period that an imminent danger situation exists, OSMRE is not required to wait until the 10-day period elapses before issuing a cessation order.

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action.

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must prove adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

CIVIL PENALTIES

Amount

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where an operator allows several days to elapse before responding to an imminent danger cessation order, extraordinary measures to abate have not been shown.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

Good Faith

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CIVIL PENALTIES--Continued

Good Faith--Continued

achieved before the time set. Where an operator allows several days to elapse before responding to an imminent danger cessation order, extraordinary measures to abate have not been shown.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

ENFORCEMENT PROCEDURES

Generally

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

OSMRE is not divested of its authority to carry out the statutory mandate to issue failure to abate cessation orders because it fails to immediately issue such orders.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency,



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

the decision to deny Federal enforcement action is reversed and inspection ordered.

W. E. Carter et al., 116 IBLA 262 (Oct. 18, 1990)

EVIDENCE

Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

To show that parties were engaged in a joint venture there must be evidence of (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

EVIDENCE--Continued

Generally--Continued

less than 2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

EXEMPTIONS

2-Acre

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

OSMRE is required to establish a prima facie case as to the validity of a cessation order. When OSMRE asserts that a state permit was improperly issued for less than 2 acres because an area reclaimed by prior removal of material from the site should have been included as area affected under the permit, OSMRE is required to show as an initial fact that the operations



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

EXEMPTIONS--Continued

2-Acre--Continued

were connected because there was either a direct relation between the parties or they were engaged in a joint venture.

Madeline Maynard, NOR Mining, & Blackhawk Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 49 (June 12, 1990)

EXPEDITED REVIEW

Generally

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

FEDERAL LANDS

Generally

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

FEDERAL LANDS--Continued

Generally--Continued

a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

The Pittsburgh & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

Cooperative Agreements

OSMRE properly applies state program requirements in determining whether or not to approve a permit application in a state with a cooperative agreement, and where, at the time of permit approval, the applicant complies with those requirements for the disclosures of entities and their compliance histories and OSMRE makes the necessary findings based thereon, an application for a permit is properly approved.

Northern Plains Resource Council et al. v. Office of Surface Mining Reclamation & Enforcement, Montco (A Montana General Partnership (Intervenor)), 112 IBLA 266 (Jan. 4, 1990)

FEDERAL PROGRAM

Permits

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL PROGRAM--Continued

Permits--Continued

proposed regulations at 54 FR 9852-55 (Mar. 8, 1989), is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

HEARINGS

Generally

A petition for permission to appeal an interlocutory ruling by an Administrative Law Judge that a party is not precluded from introducing evidence on the issue of whether his mining operation caused damage off the permit is properly denied when the governing law has changed and a significant time has elapsed between the finding in a state proceeding that the operation did cause such damage and the issuance of a Federal notice of violation.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989),



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

HEARINGS--Continued

Generally--Continued

is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

The procedural rule found at 43 CFR 4.1166(c) does not require a litigant to plead all affirmative defenses when responding to a preceding pleading.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Procedure

If a party has moved for certification of a ruling by an Administrative Law Judge that does not finally dispose of a case in accordance with 43 CFR 4.1124, the party may petition the Board for permission to appeal from the interlocutory ruling by the Administrative Law Judge in accordance with 43 CFR 4.1272. The Board may grant the petition if the correctness of the ruling sought to be reviewed involves a controlling issue of law the resolution of which will materially advance final disposition of the case.

Muskingum Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Delbert Lacy (Intervenor), 113 IBLA 352 (Mar. 22, 1990)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

HYDROLOGIC SYSTEM PROTECTION

Generally

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly prevented compliance, a NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that a NOV may not be vacated because of an operator's inability to comply.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

INDIAN LANDS

Generally

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

INDIAN LANDS--Continued

Generally--Continued

not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

Lands located outside a Federal Indian reservation, the surface estate of which is owned by an Indian tribe and the mineral estate of which is privately owned, are "Indian lands" within the meaning of sec. 701(9) of SMCRA (30 U.S.C. § 1291(9)), and thus are subject to OSMRE's jurisdiction.

The Board will remand a case to an Administrative Law Judge on the question of fact whether lands allotted to individual Indians and lands owned by the United States are "Indian lands" under sec. 701(9) of SMCRA (30 U.S.C. § 1291(9) (1982)), i.e., whether they are "supervised by an Indian tribe" within the meaning of that statute, if that question was not addressed by the Judge.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

INSPECTIONS

Generally

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

Generally--Continued

regulatory authority has failed to take appropriate action.

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must prove adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

10-day Notice to State

The Secretary of the Interior through OSMRE properly has jurisdiction to issue cessation orders in states with approved programs where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSMRE issues a 10-day notice and the state fails to take appropriate action.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period that an imminent danger situation exists, OSMRE is not



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

required to wait until the 10-day period elapses before issuing a cessation order.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency, the decision to deny Federal enforcement action is reversed and inspection ordered.

W. E. Carter et al., 116 IBLA 262 (Oct. 18, 1990)

NOTICES OF VIOLATION

Generally

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly prevented compliance, a NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that a NOV may not be vacated because of an operator's inability to comply.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)

The record on appeal establishes that the mineral and surface owner was cited and served with notices of violation. Therefore, subsequent cessation orders issued for failure to abate the NOV's were not invalid for failure to cite and serve the underlying NOV's on said mineral and surface owner.

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

PERMITS

Generally

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 291 (May 10, 1990)

Approval

OSMRE properly applies state program requirements in determining whether or not to approve a permit application in a state with a cooperative agreement, and where, at the time of permit approval, the applicant complies with those requirements for the disclosures of entities and their compliance histories and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PERMITS--Continued

Approval--Continued

OSMRE makes the necessary findings based thereon, an application for a permit is properly approved.

Northern Plains Resource Council et al. v. Office of Surface Mining Reclamation & Enforcement, Montco (A Montana General Partnership (Intervenor)), 112 IBLA 266 (Jan. 4, 1990)

Revisions

An Office of Surface Mining Reclamation and Enforcement decision to disapprove an application for a significant revision of a permit in a Federal-program state is properly reviewed in accordance with the regulations at 43 CFR 4.1370-.1379, rather than regulations at 43 CFR 4.1280. Expedited review in accordance with proposed regulations at 54 FR 9852-55 (Mar. 8, 1989) is required by order of the Director of the Office of Hearings and Appeals.

Pacific Coast Coal Co., Inc., 113 IBLA 384 (Mar. 28, 1990)

PUBLIC HEALTH AND SAFETY

Imminent Danger

Where OSMRE determines that any condition or practice exists which creates an imminent danger to the health or safety of the public, it is required to immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). Where a 10-day notice has been issued to the State and OSMRE determines during the 10-day period



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PUBLIC HEALTH AND SAFETY--Continued

Imminent\_Danger--Continued

that an imminent danger situation exists, OSMRE is not required to wait until the 10-day period elapses before issuing a cessation order.

Under 30 CFR 842.11(b)(1) (1986), an immediate Federal inspection is required where the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists any condition or practice which creates an imminent danger to the health or safety of the public, and the person supplying the information supplies adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action.

Under 30 CFR 842.11(b)(1)(C) (1986), the person supplying information to OSMRE must prove adequate proof that an imminent danger to the public health and safety exists and that the State regulatory authority has failed to take appropriate action. What constitutes adequate proof must be determined on a case-by-case basis.

OSMRE establishes a prima facie case in support of the issuance of a cessation order by showing that the mining operations of the person cited in the order caused subsidence which resulted in damage to residences and which condition created an imminent danger to the public health and safety.

M & J Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 115 IBLA 8 (June 4, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE PROGRAM

Generally

The Secretary of the Interior through OSMRE properly has jurisdiction to issue cessation orders in states with approved programs where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSMRE issues a 10-day notice and the state fails to take appropriate action.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

10-day Notice to State

Where an Office of Surface Mining Reclamation and Enforcement finding that a state regulatory authority took appropriate action in response to a 10-day notice is contradicted by the record developed by the agency, the decision to deny Federal enforcement action is reversed and inspection ordered.

W. E. Carter et al., 116 IBLA 262 (Oct. 18, 1990)

STATE REGULATION

Generally

The doctrines of collateral estoppel and equitable estoppel will not preclude OSMRE from issuing its own cessation order in situations where a similar notice of violation and cessation order was issued and litigated by the state regulatory authority since the statutory scheme of SMCRA evidences a countervailing statutory



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE REGULATION--Continued

Generally--Continued

policy against application of those doctrines in such a situation.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

VALID EXISTING RIGHTS

Generally

An applicant for valid existing rights bears the burden of proving entitlement.

A decision rejecting an application for valid existing rights to mine coal on lands not subject to surface coal mining after Aug. 3, 1977, pursuant to sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(e)(3) (1988), will be affirmed where the applicant fails to show, and the record fails to demonstrate, that the necessary permits to mine the coal were applied for as of the Aug. 3, 1977, enactment of the Act.

Eastern Minerals Internat'l, Inc., 117 IBLA 221 (Dec. 21, 1990)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

VARIANCES

Generally

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

Christopher C. Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353 (May 23, 1990)

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Generally

Where OSMRE presents uncontroverted evidence showing the essential facts establishing that the operator failed to maintain sedimentation pond inlets and to stabilize rills and gullies at a mine site as required by the Oklahoma Permanent Regulatory Program regulations 816.49(e) and 816.106, and the operator admits the existence of the deteriorating conditions, but seeks to excuse its failure to comply based on its use of the best technology currently available in the face of severe weather conditions which assertedly prevented compliance, a NOV issued by OSMRE citing a violation of the Oklahoma regulations will be upheld. The regulations at 30 CFR 722.17 require that a NOV may not be vacated because of an operator's inability to comply.

Alpine Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 232 (Apr. 27, 1990)



#### SURVEYS OF PUBLIC LANDS

(See also Boundaries, Public Lands)

##### GENERALLY

When locations and lines established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. Where, as a result of two independent surveys, a hiatus was created between the south line of one township and the north line of the adjoining township, such hiatus was not included in patents to lands in either township but remains public land subject to survey.

Joie Osgood, 117 IBLA 204 (Dec. 21, 1990)

##### DEPENDENT RESURVEYS

Statements offered to show that a missing quarter section corner was not lost but obliterated lacked probative value where the witnesses had no knowledge of the original corner monument or its accessory.

Where original topographic calls are ambiguous, location of an original corner may not be made in reliance on topography alone.

Where location of a corner cannot be determined from evidence of original monument or accessory and original topographic calls are ambiguous, proportionate measurement is proper to determine corner location.

Boise Cascade Corp., Dewey L. Annon, Margaret L. Annon, 115 IBLA 327 (Aug. 7, 1990)

## SURVEYS OF PUBLIC LANDS--Continued

### DEPENDENT RESURVEYS--Continued

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Where there was no evidence that an old fence was built to a corner established by the original survey, and there was no proof that the old fence started or ended at established corners of the original survey, it was properly determined that the fence did not perpetuate an original corner location.

Where location of a corner cannot be determined from evidence of original accessories, and original topographic calls are ambiguous, proportionate measurement is a suitable means to determine the corner.

James O. Steambarge, 116 IBLA 185 (Oct. 4, 1990)

### OMITTED LANDS

An unsurveyed island, whether located in navigable or non-navigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States.

A railroad patent to the State of Michigan describing "all of section one" does not convey an unsurveyed island within the meander lines of a lake, whether navigable or non-navigable, located within sec. 1, and the United States may properly survey such island.

Northern Michigan Exploration Co., 114 IBLA 177  
(Apr. 23, 1990) 97 I.D. 171



## SURVEYS OF PUBLIC LANDS--Continued

### OMITTED LANDS--Continued

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Mr. & Mrs. Thomas J. Dekker, 114 IBLA 302 (May 10, 1990)

The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shoreline rather than the meander line is the boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. An exception to this rule arises where the lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line.

Where BLM attempts to establish that lands were omitted from an officially filed original survey as a result of gross error or fraud, it may prove by clear and convincing evidence that the original survey was grossly in error. However, it need only demonstrate by a preponderance of the evidence that the omitted land was land in place at the time of the original survey and was similar to the surveyed land at that time.

Analysis of whether a particular omitted lands case falls within the general rule or the gross error exception requires the application of various judicially evolved factors to the specific facts of the case. The three specific factors pertinent to this analysis include: (1) the size of the parcel involved, including the size of the parcel as shown by the original survey, the relative size of the new area disclosed by the more recent survey, and the magnitude of the original surveyor's error as measured by the amount of unsurveyed land in the surrounding area as a whole, with the greatest weight being given to the relative

## SURVEYS OF PUBLIC LANDS--Continued

### OMITTED LANDS--Continued

size of the omitted tract; (2) the intent of the surveyor; and (3) the nature and value of the land at the time of the survey.

Lawyers Title Insurance Corp. v. Bureau of Land Management, 117 IBLA 63 (Dec. 3, 1990)

## TIMBER SALES AND DISPOSALS

BLM may properly proceed with a proposed timber sale where the environmental assessment adequately considered all relevant matters of environmental concern, including the impact of clearcutting and road-building on moose and elk populations, the hydrologic and vegetative character of the sale area and water quality in local streams, and where the finding that the sale would not significantly affect the human environment was supported by the record and was reasonable.

G. Jon & Katherine M. Roush, 112 IBLA 293 (Jan 9, 1990)

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber sale could be recurring, where it is not evasive of



TIMBER SALES AND DISPOSALS--Continued

review, a motion to dismiss for mootness may be granted.

In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (Apr. 6, 1990)

A protest of a BLM timber sale received more than 15 days after publication of the notice of sale or the notice of decision is not timely filed and is properly denied per the terms of 43 CFR 5003.3(c).

In re Fire Fly Timber Sale, 114 IBLA 94 (Apr. 12, 1990)

A BLM decision denying a protest of a proposed timber sale will not be disturbed on appeal where appellant fails to establish that BLM did not adequately consider matters of environmental concern, such as the threat of soil erosion posed by road building and the cumulative impacts of continued timber harvesting, and appellant has failed to meet its burden of showing error in the BLM decision.

Oregon Natural Resources Council, 115 IBLA 179 (July 3, 1990)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of clear reasons for modification or reversal. When an appellant has challenged a timber sale located in an area of critical environmental concern on the basis that the sale is allegedly inconsistent with the applicable management plan, but such inconsistency has not been established, the timber sale shall be allowed to occur.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental

TIMBER SALES AND DISPOSALS--Continued

problems has been made, relevant areas of environmental concern have been identified, and the final determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

A decision to proceed with a timber sale will not be reversed due to an alleged failure to consider cumulative impacts in the sale EA where the EA is tiered to a programmatic EIS which adequately considered the cumulative impacts.

In re Grassy Overlook Timber Sale, 115 IBLA 359  
(Aug. 14, 1990)

The Secretary is vested with discretionary authority to dispose of timber upon revested Oregon and California Railroad and Reconveyed Coos Bay Wagon road grant lands. Recognizing that, having been granted this broad discretionary authority, the Secretary is afforded a great deal of latitude, this Board will normally affirm a Departmental exercise of this authority, unless the appellant or record demonstrates an abuse of discretion or that the action taken was prohibited by law. When a high bidder in a timber sale does not return the contract and other documents, or file a written request for doing so, it is proper for BLM to terminate all rights and privileges in and to the timber described in the proposed timber sales contract and reject a subsequent request for an extension of time to submit the required documents.

C & B Logging, 116 IBLA 81 (Sept. 10, 1990)



#### TIMBER SALES AND DISPOSALS--Continued

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

A decision to proceed with a timber sale will not be disturbed on appeal where it has not been established that there was a failure to consider relevant matters of environmental concern, such as impacts on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

Headwaters, Inc., 116 IBLA 129 (Sept. 21, 1990)

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire presale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will

#### TIMBER SALES AND DISPOSALS--Continued

set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

A series of approved timber sales will not be considered to constitute a taking of a migratory bird prohibited by sec. 2 of the Act of July 3, 1918, as amended, 16 U.S.C. § 703 (1988), where there is no evidence that the cutting of old-growth timber so degrades the environment as to lead to the death of any migratory bird.

Allowing the harvesting of timber on O&C lands does not violate the broad principle of multiple-use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production pursuant to the Act of Aug. 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

Oregon Natural Resources Council, 116 IBLA 355 (Nov. 5, 1990)

#### TOWNSITES

The regulation at 43 CFR 2565.7, governing conveyance of residual townsite lots which are unoccupied at the time of subdivisional survey, provides for conveyance to the municipality upon proof of incorporation. Application of this regulation to preclude conveyance to an unincorporated Native village has been held inconsistent with the Native Townsite Act and, hence, the regulation is not properly applied to the Native townsites to bar conveyance to the Native village.

Native Village of Circle, 114 IBLA 377 (May 24, 1990)



## TRESPASS

### GENERALLY

Under 30 U.S.C. § 42 (1982), the proprietor of a mining claim may appropriate nonmineral ground as a millsite for mining, milling, or other operations in connection with such claim. Occupancy of a millsite claim for purposes not related to mining operations constitutes a trespass.

Jim D. Wills, Reggie N. Wills, 113 IBLA 396 (Mar. 28, 1990)

BLM may properly require the removal of structures unintentionally erected in trespass upon public land.

Sharon R. Dayton, 117 IBLA 162 (Dec. 13, 1990)

### MEASURE OF DAMAGES

Pursuant to 43 CFR 2920.1-2(a)(1) anyone determined to be in trespass on public lands shall be liable for the administrative costs incurred by the United States as a consequence of the trespass. When the record on appeal does not support all of the administrative costs assessed by BLM, the assessment will be reduced to reflect only those costs supported by the record.

Sharon R. Dayton, 117 IBLA 162 (Dec. 13, 1990)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)  
(See also Appeals)

UNIFORM RELOCATION ASSISTANCE

Generally

Where appellants fail to establish entitlement to reimbursement for actual reasonable moving and related expenses under sec. 202(a)(1) of the Act in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Leslie Sisco, Sr., 8 OHA 134 (Jan. 12, 1990)

Moving and Related Expenses

Generally

Costs for business insurance on the displacement property and for rental of premises to which the business was relocated are not compensable as moving expenses under the Uniform Act, as amended, and the Department's regulations. Such expenses, being related to the business use of the properties concerned, are properly borne by the owners of the business as business-related expenses.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Joseph F. Wallace, 8 OHA 222 (Sept. 14, 1990)

Where claimants have not established on appeal that they are entitled under the law and the Department's regulations to a greater payment for moving and related expenses than that allowed by the Bureau in the



UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Generally--Continued

decision appealed from, the Bureau decision will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs.  
Ralph L. Chase, 8 OHA 237 (Nov. 26, 1990)

Replacement Housing Payment for Homeowners

Generally

Replacement housing differential payment benefits are properly disallowed where claimants, who were displaced from a mobile home on a rented homesite, relocated to a conventional dwelling with homesite which property cost more than that required for purchase of a mobile home replacement residence comparable to claimants' displacement residence, including the difference in rental costs for a comparable replacement homesite for a period of 4 years and 48 times the monthly rental for the Government-acquired site on which claimants' displacement mobile home was situate.

Uniform Relocation Assistance Appeal of Mr. &  
Mrs. Leslie Sisco, Sr., 8 OHA 134 (Jan. 12, 1990)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Tenants and  
Certain Others

A claimant for rental replacement housing payment benefits under § 204 of the Uniform Act, as amended, must show by sufficient evidence that the displacement residence was occupied by her as her permanent or customary and usual residence for not less than 90 days immediately prior to the initiation of negotiations for acquisition of the property by the United States.

Where claimant fails to submit sufficient evidence to establish her entitlement to rental replacement housing payment benefits under § 204 of the Uniform Act, as amended, and the decision appealed from is supported by the administrative record, disallowance of the claim will be affirmed.

Uniform Relocation Assistance Appeal of Mrs. Irene H.  
Span, 8 OHA 216 (Aug. 27, 1990)

WATER AND WATER RIGHTS

RECLAMATION PROJECTS

Filings by the United States

When it becomes necessary to protect the water supply of a Federal reclamation project, the United States is obligated and entitled to make filings in general stream adjudications on behalf of project water rights to which the United States holds legal title.

The United States is not obligated to make water rights filings or present evidence of beneficial use on behalf of individual water users. In addition, when the United States files in general stream adjudications in states that do not distinguish between storage rights



WATER AND WATER RIGHTS--Continued

RECLAMATION PROJECTS--Continued

Filings by the United States--Continued

and rights to receive water, it has no evidentiary burden to carry for the individual water users. However, by making the filings of Reclamation project water rights held in its name, the United States protects its interest in the project water rights, and the project water rights users are afforded the opportunity to protect their water rights, based on their ability to establish beneficial use of water.

Filings of Claims for Water Rights in General Stream Adjudications, M-36966 (July 6, 1989) 97 I.D. 21

STATE LAWS

Neither the decrees governing the water rights involved, nor provisions of state law provide an inherent bar to the acquisition by the Secretary of water rights for use at Stillwater for wildlife purposes; however, the State Engineer may find factual reasons for disapproving an individual change of use or change of place of use application.

Authority to Provide Water to Stillwater Wildlife Management Area, M-36967 (July 10, 1989) 97 I.D. 32

#### WATER POLLUTION CONTROL

(See also Environmental Quality, Hearings)

##### GENERALLY

In determining whether a saltwater disposal well is leaking, the Bureau of Indian Affairs may consider as probative evidence the results of an Environmental Protection Agency mechanical integrity test of the well which is conducted pursuant to that agency's Underground Injection Control program under the Safe Drinking Water Act, 41 U.S.C. § 300h (1982).

Linda Mashunkashey Kays v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 431 (Sept. 17, 1990)

#### WILD AND SCENIC RIVERS ACT

In denying a right-of-way authorizing motorized access to private property across lands included in a wild and scenic river area, BLM acted contrary to sec. 12(b) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1283(b) (1982), and the implementing regulations at 43 CFR 8351.2-1, since the record established that appellants and their predecessors have historically used motorized vehicles in reaching their property.

Alvin R. Platz et al., 114 IBLA 8 (Mar. 30, 1990)  
97 I.D. 125

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load



#### WILD AND SCENIC RIVERS ACT--Continued

passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his departure as required by an operating plan made part of his permit.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

#### WILD FREE-ROAMING HORSES AND BURROS ACT

A document that is styled as a "protest" is nevertheless a notice of appeal where the person filing it has been a party in a dispute and challenges BLM's decision to repossess a wild horse.

A Private Maintenance and Care Agreement for a wild horse is properly cancelled and the horse is properly repossessed by the Federal Government where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement by "inhumanely treating" the horse, in that it was allowed to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community.

Where the record establishes that a wild free-roaming horse that has been placed for adoption was found in a deteriorated condition, the burden of proving that the horse was in satisfactory condition rests with the adopter. This burden is not met by uncorroborated assertions and statements of neighbors as to the general well-being of the horse.

Under 43 CFR 4760.1(d), BLM may, in its discretion, give a would-be adopter of a wild horse a

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

reasonable amount of time to complete required corrective actions in lieu of immediate repossession of the horse and cancellation of the Private Maintenance and Care Agreement, or may elect to repossess the horse immediately. Where the record establishes that the horse was suffering from inhumane treatment on the date of repossession, it was properly repossessed and the agreement properly cancelled.

Under paragraph 9 of BLM's Private Maintenance and Care Agreement for the adoption of wild horses, made generally applicable by 43 CFR 4760.1(a), any foal born after the adoption of a wild horse is the property of the adopter. However, the adoption of a wild horse is not final until certificate of title is issued, so that any foal born to a horse prior to issuance of certificate of title for that horse is not the property of the adopter and, where the horse has been subjected to inhumane treatment, possession of the foal is properly taken by BLM.

Authority for fining criminal violators of the regulations governing adoption of wild horses is distinct from the administrative remedies found therein. The fact that BLM did not present evidence at a criminal proceeding does not affect the validity of its evidence in the administrative proceeding, and the acquittal of a person on the criminal charge does not preclude the Department from invoking administrative remedies, including repossession of the horse and cancellation of the Private Maintenance and Care Agreement.

Thana Conk, 114 IBLA 263 (May 9, 1990)

BLM may properly cancel a Private Maintenance and Care Agreement for an adopted wild horse when there is sufficient evidence of improper care of the horse to establish that the adopter violated the terms of the Agreement.

Kathleen Chapman, 115 IBLA 59 (June 12, 1990)



WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

The Board will set aside a BLM decision to remove wild horses from a herd management area where removal is not properly predicated on an appropriate determination that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

Animal Protection Institute of America, 116 IBLA 239 (Oct. 16, 1990)

The Board will affirm a BLM decision to remove wild horses from a herd management area where removal is predicated on an analysis of grazing utilization, trend in range condition, actual use, and other factors, which demonstrate that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1988).

Animal Protection Institute of America, 117 IBLA 4 (Nov. 20, 1990)

Under 43 CFR 4750.5(b), BLM is required to transfer title to a wild horse when, after 12 months, the adopter has complied with the terms and conditions of the private maintenance and care agreement and the authorized officer determines, based on a field inspection, or the adopter provides a certification of a qualified official, that the animal has received proper care and humane treatment. However, when, prior to transfer of title, the adopter sells the animal in violation of the terms and conditions of the agreement, BLM may properly cancel the agreement.

G. W. Elliott, 117 IBLA 134 (Dec. 4, 1990)

#### WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

Where evidence of record tends to show the condition of adopted horses and/or burros is such as to threaten their continued survival, the burden is upon the adopter challenging cancellation of the adoption agreement and repossession of the animals to show that the condition was not due to any conduct or neglect on his part. A hearing may be ordered where the record presents issues of material fact.

George Gilchrist et al., 117 IBLA 142 (Dec. 11, 1990)

A BLM decision to gather wild free-roaming horses from within and outside a wild horse herd management area will be affirmed on appeal when: (1) a conclusion that the dormant season utilization levels have exceeded the utilization levels called for in an approved resource management plan is supported by field-monitoring data; (2) the actual size of the wild horse herd exceeds an appropriate management level identified in approved land-use plans; and (3) it is necessary to remove the "excess" horses to restore and maintain a thriving natural ecological balance to the range and protect it from deterioration associated with overpopulation.

Animal Protection Institute of America, 117 IBLA 208 (Dec. 21, 1990)

#### WILDERNESS ACT

While Congress has prohibited the Secretary from issuing mineral leases for lands within a wilderness study area under 30 U.S.C. § 226-3(a) (Supp. V 1987), Congress also provided that nothing in this section shall affect any authority of the Secretary to issue permits for exploration by means not requiring construction of roads or improvement of existing roads if such activity is conducted in a manner compatible



#### WILDERNESS ACT--Continued

with the preservation of the wilderness environment.  
30 U.S.C. § 226-3(b) (Supp. V 1987).

Southern Utah Wilderness Alliance, 114 IBLA 326  
(May 22, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)

A request for extension of a right-of-way for a culinary water well and related facilities within a wilderness study area is properly denied where the holder does not overcome BLM's determination that the extension will violate BLM's mandatory nonimpairment criteria.

The City of St. George, 116 IBLA 230 (Oct. 16, 1990)

#### WILDLIFE REFUGES AND PROJECTS

(See also Exchanges of Land, Migratory Bird Conservation Act)

#### LEASES AND PERMITS

Noncompetitive oil and gas lease offers filed prior to Nov. 14, 1983, for any lands which are part of a unit of the National Wildlife Refuge System outside of Alaska may not be adjudicated pending promulgation of regulations explicitly authorizing the leasing of such lands, a hearing on such regulatory revisions, and

## WILDLIFE REFUGES AND PROJECTS--Continued

### LEASES AND PERMITS--Continued

preparation of an environmental impact statement as required by the terms of P.L. 98-151, § 137, 97 Stat. 964, 981 (1983). Such offers are properly suspended pending compliance with the statutory requirements.

Lowell J. Simons, 114 IBLA 284 (May 9, 1990)

## WITHDRAWALS AND RESERVATIONS

### GENERALLY

To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal; that the person making the amended location had an unbroken chain of title with the original locators; and that the location predating the withdrawal was properly made.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393 (Mar. 28, 1990)



## WITHDRAWALS AND RESERVATIONS--Continued

### GENERALLY--Continued

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register. A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105 (Sept. 17, 1990)

### EFFECT OF

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal,

WITHDRAWALS AND RESERVATIONS--Continued

EFFECT OF--Continued

the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

State of Alaska, 113 IBLA 86 (Feb. 13, 1990)

Where BLM declares mining claims null and void ab initio due to location on unavailable wilderness land, but the mining claimant offers a map to show that some of the mining claims lie entirely on land open to mineral entry and other claims only partially overlap wilderness land, the decision will be reversed and remanded to BLM to verify the location of the overlapping claims.

Raymundo J. Chico, 115 IBLA 4 (May 30, 1990)



## WITHDRAWALS AND RESERVATIONS--Continued

### POWERSITES

Where BLM declares a mining claim null and void ab initio to the extent that it overlaps a prior powersite withdrawal and BLM has not considered the effect of 30 U.S.C. § 621 (1982), on the powersite withdrawal, the Board will set aside BLM's decision and remand the case for further action.

Seth M. Reilly, Keith H. Stokes, 112 IBLA 273 (Jan. 4, 1990)

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

Jack T. Kelly, 113 IBLA 280 (Mar. 12, 1990)

Where Congress has provided in 16 U.S.C. § 818 (1982), that lands sought for a proposed power project shall from the date of the filing of an application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Federal Power Commission or by Congress, and thereafter has further withdrawn these same lands for selection pursuant to 43 U.S.C. § 1610 (1982), BLM may properly convey such lands to a Native corporation selecting same, all else being regular.

North Coast Development Co., 115 IBLA 301 (Aug. 6, 1990)

## WITHDRAWALS AND RESERVATIONS--Continued

### RECLAMATION WITHDRAWALS

A mining claim located on lands withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Duane L. & Wyoma I. Pearson et al., 113 IBLA 393  
(Mar. 28, 1990)

A mining claim located on land withdrawn under a first-form reclamation withdrawal pursuant to the Act of June 17, 1902, is null and void ab initio. A first-form reclamation withdrawal effective before Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the 1902 Act. The Mining Claims Rights Restoration Act of 1955 does not confer a right to enter and locate mining claims on lands withdrawn under a first-form reclamation withdrawal.

Glenn Freeman, Judith L. D. Freeman, 116 IBLA 105  
(Sept. 17, 1990)

### REVOCATION AND RESTORATION

Congress has limited the exercise of the authority to make, modify, extend, or revoke withdrawals to the Secretary and individuals in the Office of the Secretary, appointed by the President by and with the advice and consent of the Senate, to whom he has delegated his authority. Unless the order making a withdrawal specifies when it terminates, lands remain withdrawn until the Secretary or his properly authorized delegate issues a formal order published in the Federal Register.



## WITHDRAWALS AND RESERVATIONS--Continued

### REVOCATION AND RESTORATION--Continued

A resource management plan is properly distinguished from an order revoking a withdrawal.

Resource Associates of Alaska, 114 IBLA 216 (Apr. 25, 1990)

Where a Secretarial order withdrawing land from the location of mining claims is amended by a subsequent public land order deleting certain land from the withdrawal and BLM has administered the land as unwithdrawn, a decision declaring mining claims located thereafter on land deleted from the withdrawal to be null and void ab initio will be reversed.

William M. Stokes, William L. Stokes, Jeffery B. Hulen, 115 IBLA 28 (June 5, 1990)

## WORDS AND PHRASES

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under California law, it is the date of posting location notice on the claim. Where the notice of location expressly states the date of location as a date after the land was segregated from location by the filing and notation of a forest exchange application, the mining claim is properly held to be null and void.

John & Maureen Watson, 113 IBLA 235 (Feb. 28, 1990)

WORDS AND PHRASES--Continued

"Request for repayment." In order to constitute a "request for repayment" within the meaning of 43 U.S.C. § 1339(a) (1982), a document must, at a minimum, affirmatively seek a repayment of royalties tendered with respect to a specific lease.

Conoco Inc., 114 IBLA 28 (Apr. 3, 1990)

"Providing an unauthorized trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

Galand Haas, 114 IBLA 198 (Apr. 24, 1990)

"Holding for rejection." A decision properly "holds an application for rejection" only when BLM does not actually reject the application as of the date of the decision, but indicates that it will do so if specified defects are not cured as directed. Under this procedure, the decision is rejected only after the end of the period allowed for compliance, and the appeal period does not commence until after the compliance period has run. Where BLM mischaracterizes its decision as one holding for rejection an application for mineral patent, it is properly modified on appeal.

Where a 10-day deadline for filing a mineral patent application has irrevocably passed so that the applicant can do nothing to prevent rejection of his untimely application, it is not proper for BLM to "hold the application for rejection" by providing a compliance period to allow the applicant to conform his application to specified requirements, since compliance with the time limit is impossible, and since there is no longer any application pending before BLM to be cured. In these circumstances, BLM should reject the



#### WORDS AND PHRASES--Continued

application as untimely (subject to an immediate appeal), and advise the applicant what it would require if and when he re-executes his application or files an amended application. BLM can then adjudicate whether any new or re-executed application complies with its filing requirements.

G. Donald Massey, 114 IBLA 209 (Apr. 25, 1990)

"Federal lands." "Indian lands." The term "Indian lands," as defined by sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1291(9) (1982)), includes non-Federal lands satisfying the statutory criteria that they either be situated within the exterior boundaries of a Federal Indian Reservation or held in trust for or supervised by an Indian tribe. By the same token, lands owned by the United States are "Indian lands" under SMCRA only if they meet these statutory criteria.

"Indian lands" are specifically excepted from the definition of "Federal lands." Therefore, under SMCRA, the categories of "Indian lands" and "Federal lands" are mutually exclusive. Thus, a holding that lands are not "Indian lands" because neither the surface nor the mineral estate are "Federal lands" is properly reversed.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Navajo Tribe of Indians (Intervenor), 115 IBLA 148 (June 28, 1990)

"Interest in an oil and gas lease offer." When an applicant for an oil and gas lease has executed a promissory note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease, as defined by 43 CFR 3100.0-5(b).

Taylor Basin Partnership et al., 116 IBLA 23 (Aug. 27, 1990)







